149 U.S. 698

CASE No. 15317

RECORD, CHINESE REMOVAL CASE.

CASE No. 3.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No. 1347

LEE JOE,
Appellant,

vs.

THE UNITED STATES and JOHN W. JACOBUS, individually and as Marshal of the United States in and for the Southern District of New York,
Respondents.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 8, 1893.

C. G. BURGOYNE, Cor. Centre and Walker Sts., New York.

Case No. .

Record, Chinese Removal Case.

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UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF The Application of LEE JOE for a Writ of *Habeas Corpus*.	Case No. 3.

TO THE HONORABLE THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

And now comes LEE JOE above named and makes this his petition and complaint to this Honorable Court, and respectfully shows:

1. That your petitioner is a person of the Chinese race, born in China, and not a naturalized citizen of the United States, and that at all the times hereinafter mentioned, and more especially at the time of the passage of the Act of Congress approved May 5th, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," he was, always has been and still is a Chinese laborer within the limits of the United States and entitled to remain in the United States, in that he was within the United States at the time of the passage of the Act of Congress approved May 6th, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and has

never thereafter and up to the time of making this his petition been without the United States, and that he now resides, and for more than one year last past has resided at 2077 Third Avenue, in the City and County and State of New York, in the Southern District of New York, and within the Third District for the collection of Internal Revenue in the State of New York.

II. That your petitioner, on the 17th day of November, 1880, the day the treaty between the United States and China concerning immigration was concluded and signed, was within the United States, and was, under the terms of said treaty, accorded all the rights, privileges, immunities and exemptions which were then accorded to the citizens and subjects of the most favored nation, and prior to said last-named day, and in or about the month of July, 1874, arrived at the port of San Francisco, in the United States, with the intention of remaining and taking up his permanent residence in the said United States, and with no definite intention of returning to China, and, at the time of said treaty, had become, and has ever since been, a permanent resident of the United States under and in pursuance of the invitation extended to him and, at that time, to all other Chinamen, under the provisions of the Fifth and Sixth Articles of the Additional Articles to the treaty between the United States of America and the Ta-Tsing Empire, of the 18th of June, 1858, concluded and signed on the 28th day of July, 1868 (Burlingame Treaty), which then and there declared that the high contracting parties "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade or as *permanent* residents," and further declared that "Chinese subjects * * * residing in

the United States shall enjoy the same privileges, immunities and exemptions in respect to * * * residence as may there be enjoyed by the citizens or subjects of the most favored nation."

III. That your petitioner, since the passage of the said Act of Congress approved May 5th, 1892, and on or about the 11th day of April, 1893, applied at the office of the Collector of Internal Revenue of the District wherein he then resided in the City of New York, for a certificate of residence as is required by the 6th section of said Act of Congress last above referred to, and that the said Collector of Internal Revenue then and there refused to give him any such certificate on the ground that the witnesses which he produced to prove that he was entitled to said certificate were persons of the Chinese race, and were not credible witnesses, and that said collector required of him that he should produce a witness, other than a Chinaman, to prove that he was entitled to the said certificate of residence; that your petitioner was unable to procure any person other than a person of the Chinese race who knew and was able to truthfully swear that he was lawfully within the United States on the 5th of May, 1892, and then entitled to remain in the same, and was unable to comply with the requirement of the said collector, and that by reason thereof and because of such unavoidable cause he has been unable to procure said certificate of residence, and is now without the same.

IV. That heretofore, and on this the 6th day of May, 1893, in the City of New York, within the Southern District of New York, your petitioner was arrested without any writ or warrant by John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, on the ground that he was a Chinese laborer, found by him, the said Marshal, within the jurisdiction of the United States, after the expiration of one year from the 5th day of

May, 1892, without the certificate of residence required by said 6th section of said Act of Congress, and was thereafter taken by said Marshal before the Honorable ADDISON BROWN, a United States District Judge.

V. That thereupon your petitioner proved and clearly established to the satisfaction of said Judge that he was unable to procure the certificate of residence required by said 6th Section of said Act of Congress by reason of the unavoidable cause above set forth, and then and there offered to prove and did prove solely by a Chinese witness that he was a resident of the United States at the time of the passage of the Act of Congress, approved May 5th, 1892, and your petitioner did not prove said fact of residence by a white witness for the reason that he was unable to produce a white man who knew and was able to truthfully swear to the same.

VI. That the said United States Judge thereupon, on the ground that the 6th Section of said Act required that said fact of residence should be clearly established to the satisfaction of the court by at least one credible white witness, ordered that your petitioner be remanded to the custody of the Marshal in and for the Southern District of New York, and deported forthwith from the United States, as is provided in said Act of May 5th, 1892, all of which more fully appears by said order, a copy of which is hereto attached and made a part hereof marked " Exhibit A."

VII. That your petitioner is detained and restrained of his liberty by and in the custody of John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, under and by color of the authority of the United States, wrongfully and unlawfully, as your petitioner is informed and verily believes, and in violation of the Constitution of

the United States and of the laws thereof, and of the various treaties made and entered into between the United States of America and the Chinese Empire.

VIII. That he has not been apprehended and is not detained by virtue of any judgment or decree of any court other than the order of the said United States Judge heretofore made on this the 6th day of May, 1893, and that he is now detained by virtue of the alleged claim and authority given to the said John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, by and under said order made by said Honorable ADDISON BROWN, in pursuance of the provision of the said 6th section of said Act of Congress approved May 5th, 1892, stating that whenever any Chinese laborer is found after the expiration of one year from the 5th day of May, 1892, within the jurisdiction of the United States without the certificate of residence required by said Act of Congress, and is arrested by any one of certain specified government officers and taken before any United States Judge, it shall be the duty of said Judge to order that said Chinese laborer be deported from the United States unless he shall establish clearly to the satisfaction of said Judge that by reason of accident, sickness or other unavoidable cause he has been unable to procure his said certificate of residence and to the satisfaction of the Court, and by at least one credible white witness that he was a resident of the United States at the time of the passage of the Act of May 5th, 1892.

IX. That, as your petitioner is informed and verily believes, his detention by the said John W. Jacobus, United States Marshal as aforesaid, by and under the direction of the order of said United States Judge, the Honorable ADDISON BROWN, is without jurisdiction and void and unconstitutional and that your petitioner is restrained of his liberty without due process of law and

against his rights under the Constitution of the United States and the laws thereof and the various treaties between the United States of America and the Chinese Empire and unlawfully and without authority under the guise and color of proceedings against him for the commission of the alleged offense against the provisions of the said 6th section of the said Act of Congress of May 5th, 1892, to wit, of being now without the certificate of residence required by said section, which said alleged offense is not, as this petitioner is informed and verily believes, any offense whatever in that the whole of said 6th section of said Act of Congress of May 5th, 1892, is unconstitutional, void and of no effect.

X. And your petitioner further says that no previous application for a writ of *habeas corpus* has been made by him to this or any other Court or Judge.

Wherefore, your petitioner prays that this Honorable Court will order a writ of *habeas corpus* to be issued out of this Court to said John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, requiring him to forthwith produce the body of your petitioner before this Honorable Court and there to abide what shall be ordered by this Honorable Court in the premises, and, in the meantime, your petitioner prays that he may be committed to the custody of his counsel.

And, as in duty bound, your petitioner will ever pray.

his
LEE ⋈ JOE.
mark

Witness:

GUY MAINE.

SOUTHERN DISTRICT OF NEW YORK, ss.:

LEE JOE, being duly sworn, deposes and says that he is the petitioner and complainant hereinbefore named; that he has heard read and translated to him the foregoing petition and complaint, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

his
LEE ⋊ JOE.
mark

Witness:
GUY MAINE.

Subscribed and sworn to before me this 6th day of May, 1893.

JOHN E. KENNEDY,
Notary Public.

[SEAL.]

Exhibit A.

IN THE MATTER
OF
the Arrest and Deportation of LEE JOE, a Chinese laborer.

LEE JOE, a Chinese laborer, having been arrested in the City of New York on this 6th day of May, 1893, and brought before me, a United States Judge, by John W. Jacobus, the Marshal of the United States in and for the Southern District of New

York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the Act of Congress approved on the 5th day of May, 1892, and entitled, "An Act to prohibit the coming of Chinese persons into the United States" without having the certificate of residence required by said act, and having clearly established to my satisfaction that he was unable to procure said certificate by reason of the following unavoidable cause, viz.: That on the 11th day of April, 1893, he applied to the collector of internal revenue of the district wherein he resided at the time of his said application for the required certificate of residence, that said collector refused to give him the same on the ground that the witnesses whom he produced to show that he was entitled to such certificate were Chinamen, and, therefore, not credible witnesses, and that the said collector, before he would give him such certificate, required him to produce a witness other than a Chinaman to prove that he was entitled to the said certificate of residence, which he, the said Lee Joe, was unable to do, because of the fact that there was no man other than a Chinaman who knew and could truthfully swear that he, the said Lee Joe, was lawfully within the United States on the 5th day of May, 1892; and the said Lee Joe having failed to establish to the satisfaction of the Court, by at least one credible white witness, that he was a resident of the United States at the time of the passage of the said Act of Congress approved May 5th, 1892, although he has established that fact to my satisfaction by the testimony before me of Guy Maine, a Chinese witness and gentleman, a lawful resident of New York:

Now, on motion of Edward Mitchell, the United States Attorney in and for the Southern District of New York, it is

Ordered, that the said Lee Joe be, and he hereby is, remanded to the custody of the said John W. Jacobus,

the United States Marshal in and for the Southern District of New York; and it is further

Ordered, that the said Lee Joe be deported from the United States of America, in accordance with the provisions of said Act of Congress, approved on the 5th day of May, 1892.

Dated New York, May 6th, 1893.

ADDISON BROWN,
United States District Judge for the Southern District of New York.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the matter of the application of Lee Joe for a writ of *habeas corpus*. Petition for a writ of *habeas corpus*. Maxwell Evarts, Attorney for Petitioner, 23 Broad Street, New York City. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, in the Second Circuit, held at the Court Rooms thereof, in the Post-Office Building, in the City of New York, on the 6th day of May, 1893.

Present—The HONORABLE E. HENRY LACOMBE, Circuit Judge.

IN THE MATTER

OF

The Application of LEE JOE for a Writ of *Habeas Corpus*.

On reading and filing the petition in the above-entitled matter, verified by Lee Joe on this the 6th day of May, 1893, and on motion of Maxwell Evarts, the attorney for the petitioner, it is

Ordered, that a writ of *habeas corpus* issue directed to John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, as prayed for in said petition, and that said writ of *habeas corpus* be returned forthwith, together with the return thereto of the said John W. Jacobus, Marshal as aforesaid, on the 6th day of May, 1893, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at a stated term of this Court to be held at the Post-Office Building, in the City, County and State of New York, then and there to be heard and determined and the petitioner herein disposed of as law and justice may require.

E. HENRY LACOMBE.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the matter of the application of Lee Joe for a writ of *habeas corpus*. Order for writ of *habeas corpus*. Maxwell Evarts, Attorney for Petitioner, 23 Broad Street, New York City. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

THE PRESIDENT OF THE UNITED STATES TO JOHN W. JACOBUS, THE MARSHAL OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

We command you that you have the body of Lee Joe, by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Lee Joe shall be imprisoned and detained by you, before a Stated Term of the Circuit Court of the United States in and for the Southern District of New York to be held forthwith in the Post Office Building in the City, County and State of New York, at 10 o'clock in the forenoon of this the 6th day of May, 1893, to do and receive what shall then and there be considered and determined concerning the said Lee Joe, and have with you then and there this writ.

Witness, Honorable MELVILLE W. FULLER, Chief Justice of the United States, on the 6th day of May, 1893.

[L. S.] JOHN A. SHIELDS,
Clerk.

MAXWELL EVARTS,
Attorney for Petitioner,
23 Broad Street,
N. Y. City.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee

Joe for a writ of *habeas corpus*. Writ of *habeas corpus*. Maxwell Evarts, Attorney for Petitioner, 23 Broad Street, New York City. Allowed. E. H. Lacombe. May 6th, 1893. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
The Application of LEE JOE for a Writ of *Habeas Corpus*.

In obedience to the writ of *habeas corpus* heretofore issued in the above-entitled matter, I, the Marshal of the United States in and for the Southern District of New York, do hereby make return of the body of Lee Joe, the petitioner herein, and hereby do certify to this Honorable Court the true cause and warrant for the arrest and detention by me of said Lee Joe to be the order of the United States Judge, the Honorable ADDISON BROWN, dated this 6th day of May, 1893, which is hereto annexed and made a part of this my return.

Dated New York City, May 6th, 1893.

JOHN W. JACOBUS,
U. S. Marshal.

IN THE MATTER

OF

The Arrest and Deportation of LEE JOE, a Chinese laborer.

LEE JOE, a Chinese laborer, having been arrested in the City of New York on this sixth day of May, 1893, and brought before me, a United States Judge, by John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, as being a Chinese laborer found within the jurisdiction of the United States after the expiration of one year from the passage of the Act of Congress, approved on the 5th day of May, 1892, and entitled "An Act to prohibit the coming of Chinese persons into the United States," without having the certificate of residence required by the sixth section of said Act, and having clearly established to my satisfaction that he was unable to procure said certificate by reason of the following unavoidable cause, viz., that on the 11th day of April, 1893, he applied to the Collector of Internal Revenue of the district wherein he resided at the time of his said application for the required certificate of residence, that said collector refused to give him the same on the ground that the witnesses whom he produced to show that he was entitled to such certificate were Chinamen, and therefore not credible witnesses, and that the said collector, before he would give him such certificate, required him to produce a witness other than a Chinaman to prove that he was entitled to the said certificate of residence, which he, the said Lee Joe, was unable to do because of the fact that there was no man other than a Chinaman who knew and could truthfully swear

that he, the said Lee Joe, was lawfully within the United States on the 5th day of May, 1892, and the said Lee Joe, having failed to establish to the satisfaction of the Court by at least one credible white witness that he was a resident of the United States at the time of the passage of said Act of Congress approved May 5th, 1892, although he has established that fact to my satisfaction by the testimony before me of Guy Maine, a Chinese witness and gentleman, a lawful resident of Brooklyn, New York :

Now, on motion of Edward Mitchell, the United States Attorney in and for the Southern District of New York, it is

Ordered that the said Lee Joe be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States Marshal in and for the Southern District of New York; and it is further

Ordered that the said Lee Joe be deported from the United States of America in accordance with the provisions of said Act of Congress approved on the 5th day of May, 1892.

Dated New York, May 6th, 1893.

ADDISON BROWN,
United States District Judge for the Southern District of New York.

[ENDORSED :] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Return to Writ of *Habeas Corpus*. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, held at the Court Rooms thereof in the United States Court and Post-office Building, in the City of New York, on the 6th day of May, 1893.

Present—Honorable E. HENRY LACOMBE, Circuit Judge.

IN THE MATTER

OF

The Application of LEE JOE, for a Writ of *Habeas Corpus*.

Upon reading the petition of Lee Joe, heretofore filed in the office of the Clerk of this Court, verified the 6th day of May, 1893, and addressed to this Court, praying for the issue of a writ of *habeas corpus* directed to John W. Jacobus, the United States Marshal in and for the Southern District of New York, and upon reading and filing the writ of *habeas corpus* thereupon, and in pursuance of said petition duly issued and directed to the said John W. Jacobus, the United States Marshal, and the return to said writ of *habeas corpus* made by said United States Marshal certifying to this Court the true cause of the detention by him of said Lee Joe,

Now, after hearing Maxwell Evarts, the attorney for the petitioner, in support of an application for the discharge of said Lee Joe from custody, the said Lee Joe having been produced before this Court by the said United States Marshal in obedience to said writ of *habeas corpus*, and after hearing Edward Mitchell, the United States Attorney in and for the

Southern District of New York, in opposition thereto, and in support of an application to remand said Lee Joe to the custody of the said United States Marshal, it is

Ordered that said writ of *habeas corpus* heretofore issued in the above-entitled matter on this 6th day of May, 1893, directed to John W. Jacobus, the United States Marshal in and for the Southern District of New York, be, and the same hereby is, dismissed. And it is further

Ordered that said Lee Joe be, and he hereby is, remanded to the custody of the said John W. Jacobus, the United States Marshal in and for the Southern District New York for further proceedings as provided in and by the order of deportation made and entered on this 6th day of May, 1893, by the Hon. ADDISON BROWN, Judge of the District Court of the United States in and for the Southern District of New York.

E. HENRY LACOMBE.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Order dismissing Writ of *Habeas Corpus*. Edward Mitchell, United States Attorney. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Be it remembered, that on the 6th day of May, in the year of our Lord one thousand eight hundred and ninety-three, before me, John A. Shields, the Clerk of the Circuit Court of the United States in and for the Southern District of New York, in the Second Circuit, personally came Lee Joe and Kiliaen Van Rensselaer, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Lee

Joe the sum of five hundred dollars, and the said Kiliaen Van Renssellaer the sum of five hundred dollars, separately, to be levied and made of their respective goods and chattels, lands and tenements to the use of the said United States of America, if default should be made in the condition following, to wit:

Whereas, on the 6th day of May, 1893, Lee Joe was arrested in the city of New York by John W. Jacobus, the United States Marshal in and for the Southern District of New York, in pursuance of the provisions of Section 6 of the Act of Congress, approved on the 5th day of May, 1892, and entitled "An Act to prohibit the coming of Chinese persons into the United States," in that and because the said Lee Joe was a Chinese Laborer, and was thereupon found by the said United States Marshal within the jurisdiction of the United States without the certificate of residence required by the 6th section of said Act of Congress; and

Whereas thereafter and on said last-named day the said Lee Joe was taken by said Marshal before the Honorable ADDISON BROWN, a United States Judge, and an order thereupon made by said Judge directing that the said Lee Joe be remanded to the custody of said Marshal and be deported from the United States; and

Whereas, thereafter, and on the 6th day of May, 1893, the said Lee Joe filed a petition in the United States Circuit Court in and for the Southern District of New York, addressed to said Court, and praying for the issue of a writ of *habeas corpus* to release him from the custody of said Marshal, which said writ was thereupon issued by said Circuit Court; and

Whereas, afterwards and on said 6th day of May, 1893, the said Circuit Court having considered said petition and writ of *habeas corpus*, and the return of the said Marshal thereto certifying to said Court the true cause of the detention of the said Lee Joe, did order the said writ of *habeas corpus* so issued to be dismissed, and the said Lee Joe to be remanded to the

custody of the said Marshal of the United States; and

Whereas, from said order dismissing the said writ of *habeas corpus* and remanding the said Lee Joe to the custody of the said Marshal, the said Lee Joe did thereupon pray an appeal to the Supreme Court of the United States; and

Whereas, simultaneously with said appeal the said Lee Joe did make an application to said Circuit Court to be admitted upon recognizance pending and until the determination of said appeal, which said application of the said Lee Joe to be admitted in bail was then and there allowed upon the said Lee Joe entering into a recognizance with the United States of America in the sum of five hundred dollars with sufficient surety, conditioned as herein:

Now, therefore, the condition of this recognizance is such that if upon the judgment of the Supreme Court of the United States upon said appeal from the final decision of said Circuit Court of the United States dismissing said writ of *habeas corpus* and remanding the said Lee Joe to the custody of the United States Marshal as aforesaid, the said Lee Joe shall personally appear before the said Circuit Court whenever and as soon as a judgment upon the mandate of the said Supreme Court be entered in said Circuit Court and then and there surrender himself to the said Marshal and abide the order of the said Circuit and Supreme Courts, then this recognizance will be void; otherwise said recognizance shall remain in full force and virtue.

his
LEE ⋊ JOE. [L. S.]
mark

KILIAEN VAN RENSSELAER. [L. S.]

Acknowledged before me the day and year first above written.

JOHN A. SHIELDS,
U. S. Commissioner,
S. D. of N. Y.

SOUTHERN DISTRICT OF NEW YORK, ss.:

KILIAEN VAN RENSSELAER, of No. 134 West 79th Street, in the City of New York, being duly sworn, deposes and says, that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

KILIAEN VAN RENSSELAER.

Sworn to before me this 6th day of May, 1893.

JOHN A. SHIELDS,
U. S. Commissioner,
S. D. N. Y.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Recognizance pending appeal from order of May 6th, 1893, dismissing Writ of *Habeas Corpus*. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

SUPREME COURT OF THE UNITED STATES.

In the Matter

of

The Application of Lee Joe for a Writ of *Habeas Corpus*.

Lee Joe,
Appellant & Plaintiff in Error,

against

The United States of America and John W. Jacobus, individually and as the Marshal of the United States in and for the Southern District of New York,
Respondents & Defendants in Error.

Afterwards, to wit, on the 10th day of May, 1893, at the October Term for the year one thousand eight hundred and ninety-two of the Supreme Court of the United States, at the Capitol, in the City of Washington, in the District of Columbia, comes the said Lee Joe, by Joseph H. Choate, J. Hubley Ashton and Thos. D. Riordan, his attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit :

First. That the Circuit Court of the United States in and for the Southern District of New York, in the

second Circuit, erred in not holding, adjudging and determining that the Sixth Section of the Act of Congress approved on the 5th day of May, 1892, and entitled "An act to prohibit the coming of Chinese persons into the United States," under and in pursuance of the provisions of which the petitioner in the above-entitled matter was ordered by the Honorable ADDISON BROWN, a United States District Judge, in and for the Southern District of New York, to be deported from the United States, was unconstitutional, void and of no effect, in that said section purported and attempted to deprive the said Lee Joe of his liberty without due process of law in violation of the Fifth Amendment of the Constitution of the United States in this manner that under its provisions he, when brought before said United States Judge, was obliged by said section of the said Act to prove to the satisfaction of the Court by at least one credible white witness that he was within the United States at the time of the passage of the Act of May 5th, 1892, before he could be discharged by said United States Judge from custody upon the ground that he was without a certificate of residence by reason of an unavoidable cause, and was, in consequence of not being able to establish said fact to the satisfaction of the Court by one credible white witness ordered by said United States Judge to be deported from the United States, although the said Lee Joe had established clearly to the satisfaction of said Judge by a Chinese witness that he was unable to procure the certificate of residence required by said Act of May 5th, 1892, by reason of an unavoidable cause.

SECOND. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the 6th Section of the Act of Congress, approved on the 5th day of May, 1892, and entitled "An Act to prohibit the coming of Chinese persons into the United States" under and in pursuance of the provisions of which the petitioner in the above-entitled pro-

ceeding was heretofore arrested without warrant and detained by the Marshal of the United States in and for the Southern District of New York was unconstitutional and void and of no effect in that said section purported and attempted to deprive the said Lee Joe of his liberty without due process of law, in violation of the Fifth Amendment to the Constitution of the United States in this, that, under its provisions, he, the said Lee Joe, being a Chinese laborer who was entitled to remain, and was, therefore, lawfully within the United States, was deemed and adjudged, without a trial by jury and without any preliminary hearing before any United States Judge, United States Commissioner or other Magistrate, State or Federal, to be unlawfully within the United States from and because of this fact alone, to wit, that he was found within the jurisdiction of the United States without the certificate of residence required by said 6th section after the expiration of one year from the passage of said Act of May 5th, 1892, and was thereupon arrested without warrant by the Marshal of the United States in and for the Southern District of New York.

THIRD. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the 6th Section of the said Act of Congress approved on the 5th day of May, 1892, was unconstitutional, void and of no effect, for the further reason that it provides that the said Lee Joe and all other Chinese laborers who shall be found after the expiration of one year from the 5th day of May, 1892, within the jurisdiction of the United States without the certificate of residence required by said 6th section of said Act of Congress, and arrested by any one of certain specified officers of the United States Government, may be taken by such officer before a United States Judge, and ordered by said Judge to be deported from the United States without any trial by a jury and without

any opportunity to be heard by any United States Judge, United States Commissioner or other magistrate, State or Federal upon the merits of his or their case or upon any point except upon the question as to whether they or any of them were unable to procure said certificate of residence by reason of accident, sickness or other unavoidable cause or had lost his or their said certificate of residence, by and because of which said provisions said 6th Section of said Act of Congress purports and attempts to deprive the said Lee Joe and all other Chinese laborers who are entitled to remain in the United States of their liberty without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

FOURTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the said 6th Section of said Act was unconstitutional, void and of no effect in and because it attempted and purported to deprive the said Lee Joe of his property without due process of law in violation of the Fifth Amendment of the Constitution of the United States, in this that by reason of the extraordinary and summary procedure enacted by said section, it was provided that he and all other Chinamen arrested under said section should be, immediately upon their arrest, deported out of the country without any opportunity to arrange or dispose of their property interests here, and thereby forfeiting and losing all their money, property and interests in the United States.

FIFTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the said 6th Section of said Act of May 5th, 1892, was unconstitutional and void and of no effect for the further reason that by its provisions it attempts to inflict upon the petitioner herein a cruel and unusual punishment in violation of the Eight Amendment of the Constitution of the United

States, in that it provides that the said Lee Joe, though entitled to remain and lawfully within the United States shall be deported in a summary manner from the United States as a punishment for the offense of failing to apply for the certificate of residence required by said 6th Section of said Act of May 5th, 1892.

SIXTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the said 6th Section of the said Act of May 5th, 1892, was unconstitutional, void and of no effect in that the duty imposed therein upon a United States Judge and upon a United States Court was not of a judicial nature and formed no part of the judicial power which, by the Constitution, may be vested in the Courts of the United States, and in that it attempts to vest judicial power in the Collector of Internal Revenue; and in that it attempts to vest judicial power in a United States Judge, and not in any Court of the United States; and in that the judicial power is attempted to be extended by the sixth section of the act to what is not a case arising under the Constitution and Laws of the United States, contrary to the Third Article of the Constitution.

SEVENTH. That the said Circuit Court erred in not holding, adjudging and determining that the said sixth section of said Act was in violation of the various treaties between the United States of America and the Chinese Empire, and therefore void and of no effect.

EIGHTH. That the said Circuit Court erred in not holding, adjudging and determining that the said sixth section of said Act was unconstitutional, void and of no effect in that the same was a bill of attainder and therefore in violation of subdivision three, section nine, article one of the Constitution

NINTH. That the said Circuit Court erred in not holding, adjudging and determining that the said sixth

section of said act was unconstitutional, void and of no effect in that the same was in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

TENTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the said 6th section of the said Act of May 5th, 1892, was unconstitutional, void and of no effect for this reason that there is no power given to Congress by the Constitution, and that there is no power in Congress, by reason of any inherent power of sovereignty, to pass an act removing from the United States a friendly alien resident.

ELEVENTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the said 6th section of said Act of May 5th, 1892, was an attempt on the part of the Congress of the United States to enact legislation which it has no power to enact, either by any of the express powers conferred upon it by the Constitution or by any of the amendments thereto, or by any incidental power which may be exercised in their behalf or otherwise.

TWELFTH. That the said Circuit Court of the United States erred in not holding, adjudging and determining that the Marshal of the United States in and for the Southern District of New York had no authority to arrest the said Lee Joe or to restrain him of his liberty.

THIRTEENTH. That the Circuit Court of the United States in and for the Southern District of New York erred in not discharging the said Lee Joe upon the return of the writ of *habeas corpus* heretofore issued herein and erred in dismissing said writ.

FOURTEENTH. That the said Circuit Court erred in remanding the said Lee Joe to the custody of the said United States Marshal.

Wherefore, the said Lee Joe prays that the order of the Circuit Court in and for the Southern District of New York entered in the office of the Clerk of said Court on the 6th day of May, 1893, dismissing the writ of *habeas corpus* heretofore issued herein be reversed and that the said Circuit Court of the United States be ordered to enter an order directing the discharge of the said Lee Joe.

JOSEPH H. CHOATE,
J. HUBLEY ASHTON,
THOS. D. RIORDAN,
Attorneys for Appellant.

[ENDORSED:] Supreme Court of the United States. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Assignment of Errors. Joseph H. Choate, Attorney for Petitioner and Appellant, 52 Wall Street, New York City. Due service of a copy of the within paper is admitted May 6th, 1893. Edwd. Mitchell, U. S. Atty. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
The Application of LEE JOE for a Writ of *Habeas Corpus*.

LEE JOE, the petitioner in the above-entitled proceeding, feeling himself aggrieved by the order heretofore entered herein on the 6th day of May, 1893, dismissing the writ of *habeas corpus* theretofore granted, and remand-

ing the said Lee Joe to the custody of John W. Jacobus, the Marshal of the United States in and for the Southern District of New York, doth hereby appeal from the said order of the 6th day of May, 1893, to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

New York City, May 6th, 1893.

JOSEPH H. CHOATE,
Attorney for the Petitioner and Appellant,
52 Wall Street,
New York City.

And now, to wit, on this the 6th day of May, 1893, it is ordered that the appeal in the above-entitled proceeding be allowed as prayed for.

E. HENRY LACOMBE.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Appeal to the Supreme Court of the United States from the Order Dismissing the Writ of *Habeas Corpus*. Joseph H. Choate, Attorney for Petitioner and Appellant, 52 Wall Street, New York City. Due service of a copy of the within paper is hereby admitted. May 6th, 1893. Edward Mitchell, U. S. Atty. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, in the Second Circuit, held at the Court Rooms thereof in the United States Court and Post-Office Building in the City of New York, on the 6th day of May, 1893.

Present—HONORABLE E. HENRY LACOMBE, Circuit Judge.

IN THE MATTER

OF

The Appplication of LEE JOE for a Writ of *Habeas Corpus*.

Upon all the papers and proceedings herein, and in pursuance of the provisions of Section 765 of the United States Revised Statutes, and upon motion of Maxwell Evarts, the attorney for the petitioner in the above-entitled proceeding, it is

Ordered that a transcript of the petition, writ of *habeas corpus*, return thereto and other proceedings herein be sent up to the United States Supreme Court by the Clerk of this Court on or before Wednesday, the 10th day of May, 1893, and that said day be, and the same hereby is, made the return day of the appeal heretofore allowed herein.

E. HENRY LACOMBE.

[ENDORSED:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpas*. Order for Re-

turn to U. S. Supreme Court. Maxwell Evarts, Attorney for Petitioner, 23 Broad Street, New York City. Due service of a copy of the within paper is hereby admitted, May 6th, 1893. Edwd. Mitchell, U. S. Atty. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF The Application of LEE JOE for a Writ of *Habeas Corpus*.	
LEE JOE, Appellant and Plaintiff in Error, AGAINST THE UNITED STATES OF AMERICA and JOHN W. JACOBUS, individually and as the Marshal of the United States in and for the Southern District of New York, Respondents and Defendants in Error.	Joinder in Error.

And afterwards, to wit: on the 10th day of May, 1893, the said defendants in error, by Edward Mitchell, their attorney, come here into Court, and say that there is no error either in the record or proceedings aforesaid, or in the making of the order aforesaid.

And he prays that the said Supreme Court before the Justices thereof, now here, may proceed to examine

as well the record and proceedings aforesaid above assigned for error, and that the order aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWD. MITCHELL,
United States Attorney and Attorney for Defendants in Error.

[ENDORSED:] Supreme Court of the United States. In the Matter of the Application of Lee Joe for a writ of *Habeas Corpus*. Lee Joe, Appellant and Plaintiff in Error, vs. The United States of America and John W. Jacobus, individually and as the Marshal of the U. S. in and for the Southern District of New York, Respondents and Defendants in Error. Joinder in Error. Edward Mitchell, United States Attorney and Attorney for Defendants in Error. Due service of a copy of the within paper is hereby admitted May 6th, 1893. Joseph H. Choate, Atty. for Petnr. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
The Application of LEE JOE for a Writ of *Habeas Corpus*.

KNOW ALL MEN BY THESE PRESENTS:

That we, Lee Joe, residing at 2077 Third avenue in the City of New York, and Kiliaen Van Rensselaer, residing at 134 West 79th street in the City of New York, are held and firmly bound unto the United States of America

and John W. Jacobus individually, and as the Marshal of the United States in and for the Southern District of New York, in the sum of five hundred dollars to be paid to the said obligees, for the payment of which well and truly to be made we bind ourselves, and each of us, and our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated the 6th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas, the above-named Lee Joe has presented an appeal to the Supreme Court of the United States to reverse the order dismissing the writ of *habeas corpus* herein, heretofore made in the above-entitled proceeding on the 6th day of May, 1893, by the Circuit Court of the United States in and for the Southern District of New York, and duly entered on said day in the office of the Clerk of said Court;

Now, therefore, the condition of this obligation is such that if the above-named Lee Joe shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

his
LEE ⋈ JOE. [L. S.]
mark

KILIAEN VAN RENSSELAER. [L. S.]

Sealed and delivered and taken and acknowledged this 6th day of May, 1893, before me.

JOHN A. SHIELDS,
U. S. Commissioner,
S. D. N. Y.

United States of America,
Southern District of New York, } ss.:
City and County of New York,

Kiliaen Van Rensselaer, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

Kiliaen Van Rensselaer.

Sworn to before me this
6th day of May, 1893.

John A. Shields,
U. S. Commissioner,
S. D. N. Y.

United States of America,
Southern District of New York, } ss.:
City and County of New York,

On this 6th day of May, one thousand eight hundred and ninety-three, before me personally came Lee Joe and Kiliaen Van Rensselaer, to me known, and known to me to be the individuals mentioned and described in the foregoing instrument, and they severally acknowleged to me that they executed the same.

John A. Shields,
U. S. Commissioner,
S. D. N. Y.

[Endorsed:] U. S. Circuit Court, Southern District of New York. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Bond on Appeal to the Supreme Court of the United States. Maxwell Evarts, Attorney for Petitioner, 23 Broad Street, New York City. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES OF AMERICA, ss.:

TO THE UNITED STATES OF AMERICA AND JOHN W. JACOBUS, INDIVIDUALLY AND AS THE MARSHAL OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden at Washington, in the District of Columbia, on Wednesday, the 10th day of May, one thousand eight hundred and ninety-three, pursuant to an appeal taken, allowed and filed in the office of the clerk of the Circuit Court of the United States in and for the Southern District of New York in the Second Circuit, wherein Lee Joe is appellant and the United States of America and John W. Jacobus, individually and as the Marshal of the United States in and for the Southern District of New York, are respondents, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated, New York City, May, 6th, 1893.

E. HENRY LACOMBE.

[ENDORSED:] United States Supreme Court. In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*. Lee Joe, Appellant and Plaintiff in Error, vs. United States of America and John W. Jacobus, individually and as the Marshal of the United States in and for the Southern District of New York, Respondents and Defendants in Error. Citation. Joseph H. Choate, Attorney for Appellant, 23 Broad Street, New York City. Due service of a copy of the within paper is hereby admitted May 6th, 1893. Edwd. Mitchell, U. S. Atty. U. S. Circuit Court. Filed May 6th, 1893. John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States in and for the Southern District of New York in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-two inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the matter of the application of Lee Joe for a writ of *habeas corpus*, Lee Joe, appellant and plaintiff in error, against The United States of America, and John W. Jacobus, individually and as Marshal of the United States in and for the Southern District of New York, respondents and defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York in the Second Circuit, this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Seal of U. S. Circuit Court in and for the Southern District of New York.

JOHN A. SHIELDS,
Clerk.

CHINESE REMOVAL CASES.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
The Application of FONG YUE TING for a Writ of *Habeas Corpus*.

CASE No. 1.

IN THE MATTER
OF
The Application of WONG QUAN for a Writ of *Habeas Corpus*.

CASE No. 2.

IN THE MATTER
OF
The Application of LEE JOE for a Writ of *Habeas Corpus*.

CASE No. 3.

BRIEF FOR APPELLANTS.

JOSEPH H. CHOATE,
MAXWELL EVARTS,
Of Counsel.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States in and for the Southern District of New York in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-two inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the matter of the application of Lee Joe for a writ of *habeas corpus*, Lee Joe, appellant and plaintiff in error, against The United States of America, and John W. Jacobus, individually and as Marshal of the United States in and for the Southern District of New York, respondents and defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York in the Second Circuit, this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth.

Seal of U. S. Circuit Court in and for the Southern District of New York.

JOHN A. SHIELDS,
Clerk.

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Office Supreme Court U. S.
FILED.
MAY 10 1893
JAMES H. MCKENNEY,

CHINESE REMOVAL CASES.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF The Application of FONG YUE TING for a Writ of *Habeas Corpus.*	CASE No. 1.
IN THE MATTER OF The Application of WONG QUAN for a Writ of *Habeas Corpus.*	CASE No. 2.
IN THE MATTER OF The Application of LEE JOE for a Writ of *Habeas Corpus.*	CASE No. 3.

BRIEF FOR APPELLANTS.

JOSEPH H. CHOATE,
MAXWELL EVARTS,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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SUPREME COURT OF THE UNITED STATES.

In the Matter of the Application of Fong Yue Ting for a writ of *Habeas Corpus*.	Case No. 1.
In the Matter of the Application of Wong Quan for a Writ of *Habeas Corpus*.	Case No. 2.
In the Matter of the Application of Lee Joe for a Writ of *Habeas Corpus*.	Case No. 3.

Brief on Behalf of the Petitioners, Appellants, on Appeals from Orders Dismissing Writs of Habeas Corpus and Remanding Appellants to the Custody of the United States Marshal.

STATEMENTS OF FACTS.

Case No. 1.

The petitioner, Fong Yue Ting, is a Chinese laborer, born in China, who thereafter came to this country in and about the month of July, 1879, arriving at

the port of San Francisco, California. He has never become a naturalized citizen of the United States, and has never been out of the country since his arrival, and has lived in the City of New York since about the year 1884. He neglected, failed and refused to apply to the Collector of Internal Revenue of the District in which he has resided since the passage of the Act of Congress approved May 5th, 1892, entitled "An Act to prohibit the coming of Chinese laborers into the United States," for a certificate of residence as is required by the Sixth Section of said act, which section will be found quoted at length on page 9 of this brief.

On the 6th day of May, 1893, the said Fong Yue Ting was arrested by the United States Marshal in and for the Southern District of New York, as being a Chinese laborer found within the jurisdiction of the United States without the required certificate of residence after one year from the passage of the act last referred to. The appellant at once, and before he was taken before a United States Judge, as required by said sixth section, presented a petition to the Circuit Court of the United States in and for the Southern District of New York, praying that a writ of *habeas corpus* should issue, directed to said United States Marshal in whose custody he was then detained, ordering him to bring before the Court the body of the petitioner. A writ of *habeas corpus* was thereupon issued, and upon the return thereof the same was dismissed and appellant remanded to the custody of the said Marshal. An appeal was then taken to this Court from the order dismissing said writ of *habeas corpus*.

CASE NO. 2.

The facts in this case are the same as the facts in the preceding case, except as hereinafter stated.

The petitioner Wong Quan arrived at the Port of San Francisco in the year 1877, and thereafter came to

New York in and about the year 1882. After his arrest by the United States Marshal in and for the Southern District of New York on the 6th day of May, 1893, for the same reason that the petitioner in the preceding case was arrested, the said Wong Quan was taken before a United States Judge, who immediately ordered that he should be remanded to the custody of the said Marshal and deported from the United States. The appellant then presented a petition to the Circuit Court of the United States in and for the Southern District of New York, praying that a writ of *habeas corpus* should issue directed to the said United States Marshal, in whose custody he was then detained. A writ of *habeas corpus* was thereupon issued, and upon the return thereof the same was dismissed, and the appellant remanded to the custody of the said Marshal. An appeal was then taken to this Court from the order dismissing said writ of *habeas corpus*.

CASE NO. 3.

The appellant in this case is a Chinese laborer, born in China, who thereafter came to this country in the year 1874, arriving at the port of San Francisco, California. He has never been out of the country since his arrival, nor has he ever become a naturalized citizen of the United States. He has resided in the City of New York since about the year 1882. On the 11th day of April, 1893, he applied at the office of the Collector of Internal Revenue, in the district where he had then resided for over a year past, for a certificate of residence, as is required by the Sixth Section of the Act of Congress, approved on the 6th of May, 1892. At the time of his application, he produced before the Collector two Chinese witnesses to prove the facts necessary to enable him to obtain the required certificate; that is to say, to prove the fact that he came to this country prior to the ninetieth day after the passage of the act approved on the 6th day

of May, 1882, and that he had never been out of the country after the passage of the act approved October 1st, 1888 (it being necessary to show these facts in order to prove that he was a Chinaman "entitled to remain in the United States," as is required by said sixth section of the Act of May 5th, 1892). The said Collector refused to grant his application on the ground that the witnesses that he produced were not credible witnesses, in that and because they were persons of the Chinese race, and required that he should produce a white witness to prove said facts, which the appellant was unable to do for the reason that no white man knew said facts, and was able to truthfully swear to the same. Thereafter, and on the 6th day of May, 1892, the appellant was arrested by the United States Marshal for the Southern District of New York as being a Chinese laborer found within the jurisdiction of the United States without the required certificate of residence after one year from the passage of the Act of May 5th, 1892. He was thereupon brought before a United States Judge, and the said appellant established clearly to the satisfaction of said Judge that, because of the said refusal of the said Collector of Internal Revenue to give him the certificate of residence for which he applied, he was without such certificate by reason of an unavoidable cause. This the appellant established by his own testimony and the testimony of a Chinese witness. Thereupon, the appellant attempted to prove to the satisfaction of the Court, by himself and by the same witness by whom he had proved that he was without such certificate by reason of an unavoidable cause, that he was a resident of the United States at the time of the passage of the Act of May 5, 1892. The said United States Judge, however, notwithstanding the evidence offered by the appellant to prove said fact of residence, ordered that the appellant should be remanded to the custody of the said Marshal of the United States and de-

ported from the United States as provided by the Act of May 5, 1892. The appellant then presented a petition to the Circuit Court of the United States in and for the Southern District of New York praying that a writ of *habeas corpus* should issue directing the United States Marshal, in whose custody he was then detained, to produce him before the said Court. A writ of *habeas corpus* was thereupon issued, and upon the return thereof the same was dismissed, and the appellant remanded to the custody of the said Marshal. An appeal was then taken to this Court from the order dismissing said writ of *habeas corpus*.

ARGUMENT.

The Act of May 5th, 1892, is entitled " An Act to prohibit the coming of Chinese persons into the United States " and the title describes with perfect accuracy the object of the enactment. The Act of May 6th, 1882, being " An Act to execute certain treaty stipulations relating to Chinese," and which had suspended for ten years after its passage the coming of Chinese laborers to the United States because " in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof " was about to expire. The Acts of 1884 and 1888, which had been passed in amendment and aid of the Act of 1882, had all for their objects the more rigid enforcement of the provisions of that Act, and had accomplished so far as statutes could do so, the complete exclusion from our shores of all coming Chinese laborers, whether newcomers or those who after leaving this country were seeking to return. But not a word in any of these acts had impaired the status of Chinese laborers, who prior to the expiration of ninety days

after the passage of the Act of May 6th, 1882, had come into the country under the invitation held out by the Treaty of 1868 and confirmed by the Treaty of 1880, and under the permission contained in the Act of 1882, and who had thenceforth continued their residence here. To ascertain what this status is, we must resort to the provisions of that treaty, which to this day, so far as they affect these resident laborers, have not been changed.

By the previous treaty of July 28, 1868, commonly known as the "Burlingame Treaty," the Governments of the United States and China had recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of free migration and emigration of their citizens and subjects, respectively, from one country to the other, for purposes of curiosity, of trade, *or as permanent residents*," (Art. V.) and accordingly that treaty provided that citizens of the United States visiting or residing in China, and Chinese subjects visiting or residing in the United States, should enjoy the same privileges, immunities or exemptions in respect of travel or residence as should be accorded to the most favored nation in the country in which they should respectively be visiting or residing (16 U. S. Stat., 739).

The first three articles of the treaty of November 17, 1880 (22 U. S. Stat., at page 826), are as follows, viz. :

> "ARTICLE I. Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the

United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ARTICLE II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, *and Chinese laborers who are now in the United States* shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

ARTICLE III. If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nations, and to which they are entitled by treaty.

At the time of the making of this treaty many thousands and tens of thousands of Chinese laborers, induced by the cordial invitation held out to them by the Burlingame Treaty, had settled in the United States as their permanent residence, and have remained here ever since. These petitioners all belong to that category and represent their rights, and this class is believed to constitute a large proportion of the Chinese laborers now in the United States.

But in spite of the ever-increasing vigor of the successive restriction and exclusion acts, evading their prohibitions and the vigilance of the public authorities in their enforcement, another very large class of Chinese laborers had made their way into our territory. These were lawless in-

truders, not only having no right to be here, but having come in clandestinely, contrary to and in defiance of the express prohibitions of our statutes, and in appearance they were not easily distinguishable from the other class, who under the treaties were entitled to be and remain here—whose rights, however, secured to them by the treaties, had been uniformly observed and protected by the courts and the Government.

In this situation, as the Act of May 6th, 1882, was about to expire, Congress passed the Act of May 5th, 1892, for the purpose of continuing for ten years more, and reinforcing, the policy of exclusion contained in the Act of 1882, and the subsequent acts by which it had been amended and supplemented. Its text is as follows:

> An Act to prohibit the coming of Chinese persons into the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.
>
> SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the Justice, Judge, or Commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.
>
> SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be ad-

judged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such Justice, Judge, or Commissioner, his lawful right to remain in the United States.

SEC. 4. That any such Chinese person, or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided.

SEC. 5. That after the passage of this act on an application to any Judge or court of the United States in the first instance for a writ of *habeas corpus*, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

"SEC. 6. *And it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the Collector of Internal Revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, Collector of Internal revenue or his deputies, United States Marshal or his deputies, and taken before a United States Judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of the said Judge that, by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the Court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall*

appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases, the cost of said arrest and trial shall be in the discretion of the Court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge.

SEC. 7. That immediately after the passage of this act, the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable Collectors of Internal Revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants, such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the Collector of Internal Revenue for the district within which such Chinaman makes application.

SEC. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars or imprisoned in the penitentiary for a term of not more than five years.

SEC. 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the Collectors of Internal Revenue, for services performed under the provisions of this act in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

Approved May 5, 1892.

The construction, validity and effect of the sixth section of this act are brought before this Court by the present appeals.

The Act of 1892 distinctly and expressly recognizes the presence in the United States of the two classes of Chinese laborers already referred to—those "who are not lawfully entitled to be or remain in the United States" and those described in the sixth section "who are lawfully entitled to remain in the United States." As to the former class—being those who had clandestinely or otherwise unlawfully intruded into the United States after the expiration of ninety days from the passage of the Act of May 6th, 1882, provision had already been made for their removal, but always after a quasi-judicial determination upon a hearing and trial (such as it was) that they did belong to that class. The 12th section of the Act of 1882 had provided that "any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States after being brought before some Justice, Judge or Commissioner of a Court of the United States and found to be one not lawfully entitled to be or remain in the United States."

As to the rights or status of that class of Chinese persons or the legality or propriety of their removal by the method so provided, no question for consideration is here involved. That provision is properly referred to here as demonstrating that, although they were unlawful intruders—mere outlaws—the intent of Congress was, that, nevertheless, they should not be removed until, after some sort of trial before a competent judicial tribunal, they had been proved to belong to that class.

It is also referred to, to emphasize in connection with Section 4 of this Act the distinction between the two classes, for Section 4 makes those who are adjudged to be not lawfully entitled to be or remain in the United States liable to imprisonment at hard labor.

As to the the source of the right of the other class described in the 6th section as entitling them to be and remain in the United States, there can be no doubt. They had come here by the invitation held out to them by the Treaty of 1868, which recognized their inalienable right to change their allegiance and residence and to come and settle here, and the Treaty of 1880 finding them so here guaranteed their right to remain here, and as to those then here, at any rate guaranteed them against any future legislation for their removal. "*Legislation taken in regard to Chinese laborers will be of such a character* ONLY *as is necessary to enforce the regulation, limitation, or suspension of immigration.*"

As to the nature, quality and extent of the right so described as "the right lawfully to remain in the United States" there can be no manner of doubt. It was to enjoy all the rights, privileges, immunities and exemptions enjoyed here by the subjects of the most favored nation. It necessarily included the right of domicile; the right of permanent residence here; the right to enjoy their homes, their property and their families; the right to life, liberty and the pursuit of happiness, on an equal footing to this extent with our own citizens; and, as this Court has frequently held, it entitled them as "persons" to all the constitutional safeguards to life, liberty and the pursuit of happiness equally with our own citizens. They are entitled to invoke the full protection of the Fifth and the Fourteenth Amendments to the Constitution and to all the other constitutional guarantees of personal liberty and to the equal protection of the laws. As Mr. Justice MATTHEWS said in *Yick Wo vs. Hopkins*, 118 U. S., 356, 369, and the whole Court appears to have concurred: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

* * * The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the Court." *Yick Wo*, the petitioner in that case, was a native of China, who came to California in 1861, and had there been engaged in the laundry business for twenty-two years.

Such being the source and the nature of the right of the persons who alone are described in the 6th section of the Act of May 5th, 1892, when we come to consider the true construction and purpose of that enactment, we contend as our

FIRST POINT.

THAT THE COURT CANNOT IMPUTE TO CONGRESS THE INTENT, BY THE 6TH SECTION OF THE ACT, TO BANISH FROM THE SOIL OF THE UNITED STATES CHINESE LABORERS WHO, AT THE TIME OF THE PASSAGE OF THE ACT, OR AT THE LAPSE OF ONE YEAR FROM ITS PASSAGE, ARE THEREIN DESCRIBED AS "CHINESE LABORERS ENTITLED TO REMAIN IN THE UNITED STATES."

1.

First, because the obvious purport and intent expressed in the 6th section is directly the contrary. It recognizes expressly their right to remain here, and, instead of revoking or attempting to take it away, it purports to construct a scheme, the constitutionality of which is presently to be considered, by which, as to

each one of such persons in the United States, it is to be conclusively determined whether he does or does not belong to that class ; and if he is so found and adjudged to belong to that class it leaves him undisturbed in the enjoyment of his right to remain in the United States, and if, on the other hand, he is found and adjudged not to belong to that class then his removal is provided for. Congress must have assumed in constructing such scheme that every Chinese laborer belonging or claiming to belong to that class would within the year present himself to the Collector of Internal Revenue to have his right judicially determined by him ; that in each instance it would be justly determined by the Collector, so that all would receive the protection intended by the Act in the form of the Collector's certificate of residence. Obviously in this view it was the intent of the Act to protect and preserve the right to remain here to those to whom it belonged ; to separate and distinguish them from the other class to whom the right to remain did not belong, and to give them an official certificate of their right. Of course, if the scheme so constructed had been constitutional, if a judicial tribunal had been created by which the right claimed should have been adjudicated with due process of the law, one who actually had the right might, by the erroneous judgment of the Court, have been deprived of his right and thrown out of the class to which he did really belong. But that would not be for want of due process of law ; that would be only what does occasionally happen under the best devised and most safely guarded administration of justice, in the course of which men are deprived of life, liberty and property by the erroneous judgment of Courts. The mistake—the fatal mistake of Congress, as we conceive—was in substituting the arbitrary decision of the Collector, for the due form and substance of law in a judicial tribunal, to determine and take away the right to liberty. The pretence of such a trial before a court of law they had always before

awarded by the 12th section of the Act of 1882, even to the outlaws who had no right to remain.

2.

The next reason why the Court cannot impute to Congress the intent by the act to banish from our soil those who were lawfully entitled to remain here is that such an intent would be to the last degree brutal, inhuman and unjust—contrary to the usages of civilized nations—and derogatory to the good name and character of the people of the United States whom Congress represented. These Chinese laborers are lawfully entitled to remain in the United States, and have been domiciled here for more than ten years, engaged in varied and peaceful occupations, numbering, as is believed, at least one hundred thousand, and scattered through most of the States of the Union, law abiding and industrious and as to the suspension of whose continued and permanent residence here, Congress in no previous enactment had ever intimated a suggestion. The expulsion or banishment of such a class or of members of such a class of unoffending resident aliens in time of peace has never, so far as we can learn, been attempted by the government of any civilized nation in modern history. The expulsion of the Moors from Spain; the banishment of fifteen thousand Jews from England in the reign of Edward the First, are the remote precedents, which could alone be pointed to for such an enactment, and those instances have been uniformly condemned for their barbarous cruelty. Surely the Court cannot impute to Congress unless constrained so to do by necessary and unmistakable language such an intent. But this is exactly what is imputed to Congress by those who claim that the Government had the power to expel all the Chinese from our soil, and that this enactment must be construed and accepted as a conditional exercise of that power.

3.

The next and equally conclusive reason why the Court should not impute to Congress the intent by the sixth section of the act to banish from our territory Chinese laborers, who were lawfully entitled to remain here, is that such an enactment would constitute a gross and flagrant violation of an existing treaty with a friendly nation with which we are at peace, and which has always most sacredly observed its treaty stipulations with us. The pledge that the Chinese laborers who were here at the time of the making of the Treaty of November 17th, 1880, should remain here, and that no legislation should be taken to disturb them, but that our Government should protect them always from abuse, is most positive and explicit, and nothing short of outrageous breach of faith, which this Court cannot impute to Congress, could lead to its violation.

We are well aware that a treaty has no greater legislative force than an Act of Congress, and that this Court has held that where they are in irreconcilable conflict on the same subject matter the Act of Congress, if later in date, must prevail. But as Mr. Justice HARLAN said in *Chew Heong* vs. United States, 112 U. S., 536, 539:

> " The Court should be slow to assume that Con-
> " gress intended to violate the stipulations of a
> " treaty, so recently made with the Government of
> " another country. 'There would no longer be
> " any security,' says Vattel, 'no longer any com-
> " merce between mankind, if they did not think
> " themselves obliged to keep faith with each other,
> " and to perform their promises (Vattel, Book 2,
> " Ch. 12.) And as sovereign nations, acknowl-
> " edging no superior, cannot be com-
> " pelled to accept any interpretation,
> " however just and reasonable, the 'faith
> " of treaties constitutes in this respect all the se-
> " curity of contracting powers' *(Ib.*, Ch. 17*)*.
> " 'Treaties of every kind,' says Kent, 'are to
> " 'receive a fair and liberal interpretation, ac-

" ' cording to the intention of the contracting par-
" ' ties, and are to be kept in the most scrupulous
" ' good faith ' (1 Kent, Com. 174). * * *
" Aside from the duty imposed by the Constitution
" to respect treaty stipulations when they become
" the subject of judicial proceedings, the Court
" cannot be unmindful of the fact, that the honor of
" the Government and people of the United States is
" involved in every inquiry whether rights secured
" by such stipulations shall be recognized and pro-
" tected. And it would be wanting in proper re-
" spect for the intelligence and patriotism of a
" co-ordinate department of the Government were
" it to doubt, for a moment, that these considera-
" tions were present in the minds of its members
" when the legislation in question was enacted."

4.

The fourth and final reason why the Court should not impute to Congress the intent by the 6th section of the Act to banish from our soil Chinese laborers who are lawfully entitled to remain here, is that THERE IS NO POWER IN CONGRESS TO ENACT A LAW EXPELLING FROM THE UNITED STATES FRIENDLY ALIEN RESIDENTS, EXCEPT AS A PUNISHMENT FOR CRIME.

In all the discussion of this point two propositions are admitted by the appellants :

FIRST. That Congress has the same power to expel a friendly alien resident as a punishment for a crime as it has to expel a citizen as a punishment for a crime, viz., after conviction thereof according to due process of law and if the magnitude of the offense is proportionate to the severity of the punishment.

SECOND. That Congress has power under the Constitution, as an incident to the power to declare war, to expel an alien enemy.

In other words, the rights of alien friends, not alien enemies, are now to be determined, and, to avoid any

confusion in the consideration of the questions hereafter raised, it is essential that these two admissions should never be lost sight of.

a.

SUCH A LAW CANNOT BE PASSED BY CONGRESS ON THE GROUND THAT THE POWER TO PASS IT IS AN INHERENT POWER OF SOVEREIGNITY. THE SOVEREIGN POWER OF THIS REPUBLIC RESTS NOT IN CONGRESS, BUT IN THE PEOPLE.

After the American Colonies declared their independence of England each State was itself a sovereign and had in itself sovereign power in the true and fullest sense of the term. This power then resided in the mass of the individuals composing each particular State. Prior to the signing of the Federal Constitution on the 17th day of September, 1787, and its subsequent ratification by the States, the inhabitants of nine of them met, each in their own way, and from the sovereign powers then resting in them carved out certain of these powers, and formulated and framed them into constitutions, leaving still in themselves those sovereign powers which they had not specifically taken away and delegated by the Constitutions enacted by them. At the time when the Federal Constitution was created a similar process was again gone through, and from the State Constitutions which had been previously enacted, and from the sovereign powers still left in the people after their enactment, there were separated certain sovereign powers, which powers form the Federal Constitution, and were delegated as is therein provided; leaving still in the people those sovereign powers which they had originally upon their separation from England, and which were not by them placed either in the Constitutions of the respective States, or in the Constitution of the United States.

That this was the intention of the people seems to

be clearly shown by the tenth amendment to the Federal Constitution, which was proposed to the Legislalatures of the several States by the First Congress, on the 25th of September, 1789, just two years after the signing of the Constitution, which provided that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or *to the people.*"

There can be no other meaning in this clause, and no reason for the use of the words "to the people," unless it was intended to refer to their sovereign powers which they had not taken away from themselves by either their State or Federal Constitutions. That there might be no mistake on this point, the several States passed this amendment.

That this was their idea is further shown by the clauses to be found in the different State Constitutions, of which the following is an example:

> "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them." Virginia Bill of Rights, 1776, Sec. 2 (2 Poore's Fed. and State Constitutions, 1908).

This being so, the appellants therefore claim that there is no such thing as an inherent power of sovereignty resting in Congress, that is not conferred upon it by the Constiiution. Before Congress has the power to pass a law, that power must be found in the Constitution, either expressly stated or given by implication, and no law passed by it can be sustained on the sole ground that it is passed under an inherent power of sovereignty, that it is necessary to the preservation of the nation, or an incident of sovereignty. All such powers are still in the people as a people, and before a law can be passed by Congress which is not authorized directly or incidentally by the Constitution, the power to do so must be given them

by the people, in whom the power resides by *an amendment to the Constitution.*

This is what is meant by the following clauses taken from the answer of the Commonwealth of Massachusetts to the Virginia Resolutions of 1798 :

> "That the people, in that solemn compact which is declared to be the supreme law of the land, have not constituted the State Legislatures the judges of the acts or measures of the Federal Government, *but have confided to them the power of proposing such amendments of the Constitution as shall appear to them necessary to the interests, or conformable to the wishes, of the people whom they represent.*
>
> "*That, by this construction of the Constitution, an amicable and dispassionate remedy is pointed out for any evil which experience may prove to exist, and the peace and prosperity of the United States may be preserved without interruption.*"
>
> 4 Elliott's Debates, 534.

As an illustration of our meaning, take the case of the slaves who were freed by the Civil War. Did Congress undertake to give them the right to vote under any inherent power of sovereignty ? If Congress cannot make a race of people citizens of their nation in the full sense of the term without an amendment to the Constitution giving them such power, then how can Congress pass a law removing a body of inhabitants out of its borders without an amendment to the Constitution ? If in the former case the right of citizenship could not be conferred upon certain inhabitants of this country without an amendment, in the latter case an amendment is necessary before the right to remove certain other inhabitants can be exercised, and if the right to remove can be exercised without an amendment, then certainly the right to make a citizen could have been. That is to say, Congress has never been upheld in the attempt to exercise any power as an inherent power of government, but only as it may have been given to it by the Constitution or the amendments thereto, but

has always been obliged to wait until the power to pass a law was given to it by the people.

This view is taken by the Court in the case of Lysander Spooner vs. Alexander McConnell and others (1 McLean, 337-346):

> " The terms 'sovereign power of a State' are often used, without any very definite idea of their meaning, and they are often misapplied.
>
> " Prior to the formation of the Federal Constitution, the States were sovereign in the absolute sense of the term. * * *
>
> " The people of the States, by the adoption of the Federal Constitution, imposed certain limitations in the exercise of their powers which appertained to sovereignty. But the States are still sovereign. They are bound by the compact not to exercise certain powers which they have delegated to the Federal Government, and the citizens of the State are bound to respect and obey the powers thus delegated. *But this compact or Federal Constitution, was voluntarily formed by the people of the States, in their sovereign capacity, and may be changed, at their pleasure, in the mode provided.*
>
> " *The sovereignty of a State does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the Federal and State Governments.*"

Judge FIELD in his dissenting opinion in the Legal Tender Case (110 U. S., 421, 467) says on this point (as to which there was apparently no difference of opinion among the judges):

> " *Congress can exercise no power by virtue of any supposed inherent sovereignty in the General Government.* * * * *There is no such thing as a power of inherent sovereignty in the Government of the United States.* * * * *In this country sovereignty resides in the people,* * * *"

In Campbell's case, 20 American Decisions, 360–372, it is said:

> "Here it has become very common of late to speak of the sovereign power and of the sovereignty exercised by our Government. *These words do not, however, occur either in the Constitution of this State, or that of the Union.* The words sovereign and sovereignty refer to him, or that body of men who possess the supreme power of the State; who have no superior, and who hold the supremacy—the highest authority at discretion, and without responsibility. In England, the monarch alone wears 'the golden yoke of sovereignty.' All discretionary and irresponsible power belongs to him only; except in so far as it has been expressly chartered out by him to the Parliament or the judiciary.
>
> "*But the government of this republic has been clothed with no such sovereign power or sovereignty as that of England, either altogether, or in any of its departments.* Taken collectively, or in any of its several parts, it is most truly and strictly made up of responsible and delegated power; *it is not in any sense sovereign, or a sovereignty.* * * * Ours is a government assumed under the authority of the people; it originated from the people, is founded in compact only, and instituted solely for the good of the whole; and all persons invested with legislative or executive powers of government are the trustees of the public, and as such, accountable for their conduct. Decl. Rights, Md., Arts. 1, 4. These are our fundamental axioms and first principles; consequently, the General Assembly, or all or any portion of our government, *cannot exercise soverign authority in any case over any subject whatever*, since it is clear that, when regarded in this point of view, our whole government must be considered as strictly limited, as well by its general nature, as by the special provisions of the Constitution itself. *Here, therefore, the sovereignty belongs altogether and exclusively to the people of the State.*"

In the opinion of Judge BETTS, in the case of *In the Matter of Barry*, printed at the request of this Court in 136 U. S., 597, it is said, at page 605:

> " There is, accordingly, no sure foundation for the assumption that the Federal Government possesses common-law prerogatives inherent in the sovereign which can be exercised without authority of positive law. * * *
>
> " That such attributes or functions of sovereignty cannot be inherent in the United States Government necessarily results from the character of the Government and the objects of its Constitution."

In Potter's Dwarris on Statutes (Edition 1871), page 45, after a discussion as to the powers of the English Parliament, it is said :

> " In England, Parliament is recognized as possessing the sovereign power of the country. The American Legislature possesses but a portion of the sovereign power. *The sovereignty is in the people ; and the Legislatures whom they create, can only discharge a trust, (guarded with restrictions, well defined) of which the people have made them the depository.* * * *
>
> " *The National and State Governments, all have Constitutions reduced to writing. These Constitutions emanate from the people, who are the original source of all political power.* The people in their sovereign capacity, ordain and establish this fundamental law, which is paramount to the power of the Legislature, and is the supreme law of the land."

The same idea is sustained by Judge COOLEY, in his book on " Constitutional Limitations," (6th Ed.) and is expressed as follows :

> " The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority. *The people of the Union created a national Constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty* SO FAR AS THEY WERE DISPOSED TO ALLOW THEM TO BE EXERCISED AT ALL " (p. 39).

In comparing the powers of the English Parliament with the powers of the Legislatures of the various States, Judge COOLEY says in his work, above quoted (p. 103) :

> " The strong language in which the complete jurisdiction of Parliament is here described, is certainly inapplicable to any authority in the American States, UNLESS IT BE TO THE PEOPLE OF THE STATES WHEN MET IN THEIR PRIMARY CAPACITY FOR THE FORMATION OF THEIR FUNDAMENTAL LAW."

The question of immigration into this country and of the rights of friendly alien residents, and of the right to expel from the country the inhabitants thereof, was in the minds of the people of the States when they entered into the compact of the Federal Constitution. In the Declaration of Independence one of the grievances which was alleged against the King of Great Britain was : " He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands."

Again, the interest of the people at that time, in encouraging foreigners to come to this country and to become citizens of the States, is shown by this provision of the Constitution of North Carolina (1776) : " That every foreigner * * * after one year's residence, shall be deemed a free citizen " (2 Poore's Fed. & State Con., 1414, Sec. XL).

Similar provisions are found in the constitutions of the other States, and it can never have occurred to the people at that time that, without saying so, they were vesting in Congress power to remove friendly alien residents, different from the power to remove citizens of the country. All that they thought of, all that they wished, was to bring aliens to this country—as many as would come—to extend to them every privilege,

and to place them, as quickly as possible, on the same footing as the other inhabitants of the country.

As Justice McLean said in the Passenger Cases, 7 How., 283, 401, and, as has been frequently reiterated in this Court: "To encourage foreign emigration was *a cherished policy of this country* at the time the Constitution was adopted."

That the question of "removal and expulsion from the country" was in their minds is certain, from the different sentences in the Declaration of Independence, and from the provisions of the various State Constitutions. In the Declaration of Independence, one great grievance alleged against the King was his giving his assent to acts of pretended legislation "for transporting us beyond Seas to be tried for pretended offences." And, again, we find this provision in the Constitution of Massachusetts, Chapter 2, Section 1, Art. VII. (1780):

> "That the said Governor shall not, at any time hereafter, *by virtue of any power by this Constitution granted, or hereafter to be granted to him by the Legislature, transport any of the inhabitants of this Commonwealth, or oblige them to march out of the limits of the same, without their free and voluntary consent*, or the consent of the General Court" (1 Poore's Fed. & State Con., 966).
>
> See also Constitution of New Hampshire.

It is common historical knowledge that up to the time of the adoption of the Federal Constitution the doors of each of the thirteen Colonies were wide open for the free admission of friendly aliens, and that in the then condition of the Colonies which were feebly organized communities on the border of an unoccupied continent, increase of inhabitants by immigration, was regarded as and was in fact an absolute necessity to enable the people of the United States to grapple with the great physical problem then in hand.

The people, therefore, as represented by their dele-

gates, had in their minds on the 17th September, 1787, all these questions of expulsion from the country and of the rights of aliens, and they failed to delegate to Congress by the Federal Constitution any power over this important matter. The true deduction from their having so failed to place this power in Congress is that they intended to reserve it to themselves.

Considering, therefore, all the surrounding and attendant circumstances of the time, and of the fact that all these questions were in the minds of the people of the States at the time the Federal Constitution was signed, and that they refrained from giving any expression in regard to the same in that Constitution; and considering the fact that the whole feeling of the time was opposed to any such power being given or delegated to others or separated from the people as a people, it is only fair to argue that by leaving out any provision in regard to the question of the removal of friendly alien residents, the people intended to retain that power in themselves. We adopt here the argument used by Chief-Justice WAITE in the case of *Minor vs. Happersett* (21 Wall., 162–173), in which he held that by reason of the condition of the law of the different States of the Union prior to the signing of the Constitution by them in respect to suffrage, and that there was no mention in any of the State Constitutions that a woman was permitted to vote, he held that, therefore, if it had been intended by the Federal Constitution that they should vote, such an important change in the general law of the land would have been expressly declared.

Paraphrasing his argument at page 173, words in italics being our own, we say:

> "In this condition of the law in respect to *immigrants and the removal of inhabitants of the country* in the several States, it cannot for a moment be doubted that, if it had been intended to *give to Congress a power to remove friendly alien residents*, the framers of the Constitution would not have left it to implication. So important a

> change in *the law* as it actually existed, if intended, would have been expressly declared."

It would seem that the people, when they passed their various State Constitutions considered that it was best that there should be no transportation out of the country except as a punishment for a crime. In the Constitution of New Hampshire (1784), Article 1, Section 15, we find this provision:

> "And no subject * * * shall be exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land" (2 Poore's Fed. & State Con., 1282.)

The word "subject" at that time included an alien, as was held in a case under the acts in England against Quakers reported in J. Kel. Crown Cases (p. 38). The statute there applied only to subjects. The prisoner pleaded that he was an alien, and, therefore, not a subject of the realm, but it was held that he was.

This provision of the Constitution of New Hampshire is found in the Constitutions of many of the other States.

For fear that there might in some unforeseen way creep into their laws the power of transportation, other than as a punishment for a crime, the people of the State of New York expressly provided that all powers claimed and exercised by the King of Great Britain as were repugnant to their Constitutions should be abrogated and rejected.

> "That * * * the supremacy, sovereignty, government, or prerogatives claimed or exercised by, the King of Great Britain and his predecessors, over the Colony of New York and its inhabitants, or (as) are, repugnant to this Constitution, be and they hereby are, abrogated and rejected" (Constitution New York (1777), 2 Poore's Fed. & State Con., 1338, Section 35).

It is therefore apparent from reading the Constitutions of the States, and from an examination of the

history of that time and of the opinions of the Courts, that it never was intended to give to Congress under the Federal Constitution inherent powers of sovereignty not delegated therein, and, least of all, any power to expel friendly alien residents.

b.

THE POWER TO EXPEL ALIEN RESIDENTS IN TIME OF PEACE WAS NEVER AN INCIDENT OF THE BRITISH SOVEREIGN'S POWER OR A PREROGATIVE OF THE CROWN.

1.

When the government of England was an absolute monarchy and all power resided in the King alone, it was never supposed, so far as the records of the time show, that the right to expel friendly alien residents was a prerogative of the Crown. In the time of King Alfred is the first provision as to a parliament and probably the first regulation in regard to the control of aliens.

> "King Alfred caused the Earls to meet, and ordained for a perpetual usage, that twice in the year, or oftener, if need were, in time of peace, they should assemble together at London" (Horne's Mirror of Justice, Chap. 1, Sec. 3).

Then was passed either in Alfred's time or soon thereafter a law in regard to friendly aliens by the Earls who presumably met in pursuance of the call of King Alfred, which was as follows:

> "It was forbidden, that no merchant alien should repair into England but at four fairs, and that none such should remain in the realm above forty days." (Hornes Mirror of Justice, Chapter 1, Section 3 (Ed. 1778), page 15).

The next regulation which we find in regard to aliens is this provision of MAGNA CHARTA:

> "All merchants (if they were not openly prohibited before) shall have their safe and sure con-

> duct to depart out of England, to come into England, *to tarry in*, and go through England, as well by land as by water, to buy and sell without any manner of evil tolts, by the old and rightful customs, except in time of war." (Chapter 30 Magna Charta, Lord Coke 2nd Inst., 57).

The views of Lord Coke upon this chapter of Magna Charta are as follows:

> "That before this statute, merchant strangers might be publiquely prohibited, *publice prohibeantur*. And this prohibition is intenable of merchant strangers in amitie, for this act provideth afterward for merchant strangers enemies; and therefore the prohibition intended by this act, must be by the common or publique councell of the realme, *that is, by act of parliment*, for that it concerneth the whole realme and is implyed by this word (publice)." (1 Lord Coke's 2d inst. 57.)

From the above citations it will be seen that before Magna Charta, when the government of England was an absolute monarchy, if it ever was one, the control of aliens was never exercised by the Crown, but was always regulated by Parliament. The prohibition of aliens from the country was, as Lord Coke says, "by act of parliament," and this opinion of Lord Coke, it will be observed, relates to the time prior to Magna Charta.

To be sure, all these regulations relate to merchant strangers; but, at that time, there was no other kind of foreigner in England, and, when the words "merchant strangers" are used, all aliens are referred to. This is well explained by Mr. Hobhouse in one of the debates of the House of Commons on an English Alien Bill, in which he says: "That was true as to words, but merchant strangers then included all strangers" (7 Hansard, 2d series, 1438).

This argument adduced by Mr. Hobhouse is borne out by a statement in 1 Hale's Pleas of the Crown, page 93, to the following effect:

> "The statute speaks indeed of mercatores, but under that name all foreigners living or trading here are comprised."

That this was the idea generally held at the time is enforced by a quotation from Comyn's Digest, where he refers, under the title of "Alien," to an act containing this word :

> "By the st. 27 Ed. III., 2, aliens not enemies, may safely dwell in the realm" (1 Com. Dig., Tit., Alien, C. 7).

Comyn also refers to this statute as an authority for the proposition that "merchants strangers" can safely dwell in the realm, so it is clear that he at least considered that the words merchant strangers covered all aliens (Com. Dig., Tit. Alien, C. 2).

If the regulation and removal of aliens were a prerogative of the Crown, it certainly appears never to have been exercised by the King, and to have always been in the control of Parliament. That it should be a prerogative of the Crown was certainly directly contrary to the theory and usage of Great Britain in ancient times. Friendly aliens were then treated as citizens. The King, instead of having power to remove them, was obliged to treat them as a protector and a father, and as he would have treated a citizen born in his kingdom, as is shown by the following laws of the earliest Kings of England :

> "Verily he who dooms a worse doom to the friendless and the comer from afar than to his fellow, injures himself" (the laws of King Cnut, 1 Thorpe's Ancient Laws and Institutes of England, p. 397).
>
> "If any one wrong an ecclesiastic or a foreigner through any means, as to money or as to life, then shall the king * * * be unto him in the place of a kinsman and of a protector, unless he have another" (the laws of Edward and Guthrum, 1 Thorpe's Laws, etc., 175).
>
> "And if it happened, that any * * * stranger, anywhere injured, by word or work ; then

> pertained it to king * * * that they that should make good, as they soonest might." (1 Thorpe's Ancient Laws, etc., p. 193).
>
> "And that they do not vex or provoke foreigners or comers from afar" (The laws of King Ethelred, 1 Thorpe's Ancient Laws, etc., 327).

Now, coming to more modern times, we find that it has never been acknowledged in England, except in one or two instances, which we shall hereafter cite, that it was ever a prerogative of the Crown to remove friendly alien residents. This question, though not, perhaps, essential to the debates then pending in the House of Lords and the House of Commons upon the English Alien Bill of 1816, was passed upon directly by such men as Mr. Brougham (afterwards Lord Brougham), Mr. Denman (afterwards Lord Denman), Sir Samuel Romilly, Sir James Mackintosh, Lord Holland, and Mr. Hobhouse, thus including the most distinguished lawyers of their time. All of them, without any qualification whatever, say that, in their opinion, it never was a prerogative of the Crown to expel friendly alien residents.

It will be impossible to cite the debates in the two Houses of Parliament that bear directly upon this point, and we respectfully ask this Court to read them, only submitting here a few short quotations.

Sir SAMUEL ROMILLY on this point said (34 Hansard, 1st Series, 445):

> "That in his opinion the king had not the power in time of peace to send, by his prerogative, aliens out of the country."

> "The king has no more power in England over a foreigner, so he be not an alien enemy, than over a native. * * * He is by the laws of England no more subject to the caprice of a Secretary of State than an Englishman" (Speech J. P. Grant, 34 Hansard, 1st Series, 619).

The opinions of the others referred to above are quite as much to the point as the ones we have quoted,

but not perhaps in as concise a form. The only two men at that time of any weight, who expressed any decided contrary opinion upon this question, were Lord ELDON and Lord ELLENBOROUGH.

Lord ELDON, who was then Lord Chancellor, did not seem inclined voluntarily to give any opinion on the subject, but was obliged to do so by the direct question of Lord KING, who

> " wished to ask the learned Lord on the Woolsack whether the noble Viscount had stated advisedly that there existed in the prerogative a power to send aliens, not alien enemies, out of the country; and whether that power had ever been exercised since Magna Charta " (34 Hansard, 1st series, 1065).

The value of the learned Lord's opinion is best stated by Lord HOLLAND, who

> " complained, that with all the learned Lord's legal, historical and constitutional knowledge, he had not been able to adduce a single instance in which the prerogative on this subject had been attempted to be exercised. The learned Lord merely recollected, that when a similar bill was discussing in the other House of Parliament, some persons, lawyers, were of opinion, that Lord COKE was erroneous in his explanation of that part of Magna Charta which referred to this subject. Was the authority of these individuals, influenced by the fears of the time, to be considered equivalent to the authority of such a man as Lord COKE? Such opinions, or, indeed, any opinion whatever, must be inadequate to sustain the position of the learned Lord as to the existence of a prerogative which had *not been exercised in a single instance for a period of five hundred years*, although so many occasions had occurred within that period, in which such a prerogative was most likely to have been called into action, if it had really been recognized." (34 Hansard, 1st Series, 1066).

Lord ELLENBOROUGH, when pressed, supported his opinion, that the power to expel friendly alien residents

was a prerogative of the Crown, upon the petition presented to Edward I. by the citizens of London asking him to send such aliens out of the country and upon the concurrence of the King in that petition.

34 Handsard (1st Series), 1069.

That there was such a petition is undoubtedly true. That the King concurred in it we do not find to be so. The force of Lord ELLENBOROUGH's argument is rather destroyed by the answer of the King to the citizens' petition, which Lord ELLENBOROUGH fails to cite, and which is as follows:

> "*Responsio. Rex intendit quod mercatores extranei sunt idonei et utiles magnatibus, &c.,* ET NON HABET CONSILIUM EOS EXPELLENDI" (2 Co. Inst., 741).

The only authorities other than Lord ELLENBOROUGH and Lord ELDON which can be cited in support of the proposition that the right to expel a friendly alien resident is a prerogative of the Crown, are found in a *private* opinion of Sir EDWARD NORTHEY given to the Government in 1705 when he was Attorney-General, and an opinion of Sir WILLIAM BLACKSTONE. To show what these opinions are worth we cannot do better than to quote from the argument of Sir JAMES MACKINTOSH, the whole of which we ask the Court to read, in which he speaks as follows:

> "He still remained unconvinced that the alien bill was either agreeable to the genius of our law, or justified as novelty by any danger such as ought to be the foundation of such a measure. He still conceived it to be *the most important deviation from constitutional policy and ancient usage*, that had ever been proposed to Parliament on such slight or suspicious grounds. * * * From * * * the arguments which have been offered after a twelve months leisure for research, he now thought himself justified in declaring, *that such a prerogative was not warranted by law.* All had now been said for it that could be said. And to

what did it amount? To three assertions, or as they were called, authorities—to one gross fallacy —and to some general speculations, too loose to deserve the name of argument. Three opinions were alleged in favor of this prerogative—that of Sir EDWARD NORTHEY—that of Sir WILLIAM BLACKSTONE—and that of his learned friends opposite. The opinion of Sir Edward Northey, *privately* given to the Government when he was Attorney-General in 1705, respecting certain Catholic clergymen in the Province of Maryland was, that "if they be aliens not made denizens nor naturalized, her Majesty may by law compel them to depart from Maryland;" and this opinion had been relied upon as proof that this was by law a prerogative of the Crown. No citation of supposed authority ever more betrayed the poverty of a case. It was the opinion of a private individual—the advice of a counsel to his client—for these, notwithstanding the imposing sound of Government and Attorney-General, were the terms properly applicable to Sir Edward Northey's assertions. The judgment of a Court—even a single judgment—was in itself some evidence of law. But what was the opinion of a lawyer without the proofs on which it was founded? Sir Edward Northey quoted no precedents. He produced no arguments. What was his unsupported opinion in any case? What was it more particularly in a case which must rest either on ancient usage, or on constitutional principle, or on the union of both. We had the same books and records to consult, and the same faculty of reasoning on the Constitution with Sir Edward Northey. His opinion was of no more value than that of any man who had taken a part in this discussion. * * * As to the authority of Sir William Blackstone, he certainly was not one of those who in general undervalued it. His commentaries were undoubtedly not only distinguished by their singular elegance, but by an exactness much greater than it was reasonable to expect in so brief an account of a comprehensive and intricate science. * * * But the very nature of the work made it absurd to quote it as an authority on points of rare occurrence, which must turn

on laborious investigations of ancient usage, on which he throws out a short and hasty observation, and, contrary to his usual custom, supports it by the citation of no authority. He had, indeed, a few sentences before, made rather an unfortunate citation from Pufendorff, which was relied on last year. He had quoted the assertion of Pufendorff, that all States must have a power to regulate the admission of strangers (and he might have added the return or expulsion of natives), apparently to prove that the power of admitting foreigners was, by the constitution of this country, vested in the Crown. * * * And now the wisdom of Blackstone's citation, and the supposition that he had fortified his own authority on this question by adding to it that of Pufendorff, seemed to be abandoned. What was worse, Blackstone had destroyed his own authority here, by laying down a position which no man would be found bold enough to maintain. So slight and hasty was his attention to this subject, that he lays it down, that "aliens are liable to be sent *home* whenever he sees occasion." This assertion is evidently false. Indeed, short as the passage is, it contains no less than two gross errors. The first that "the King may send the alien *home*,"—a power which has never been claimed, and which is indeed utterly untenable. *The prerogative must have spent its force as soon as it expels the alien from the British Territory.*—The second mistake was, that this power might be exercised without limitation over all aliens; which was clearly inconsistent with the letter of Magna Charta, and Blackstone's own interpretation of it. The only object of these criticisms was, to show that Blackstone wrote this passage negligently, and that it does not possess the weight which might justly be ascribed to his advised opinion." 34 Hans. (1st Series) 467 *et seq.*

It might be suggested here that the power to expel aliens from Maryland, which Sir Edward Northey claimed for the Crown, may very well have been under the ecclesiastical power of the sovereign, which was practically unlimited. They were expelled, not as being aliens, but because they were Catholics.

The only judicial opinion bearing directly upon the subject, which we have been able to discover, is the case of *Chung Teong Toy vs. Musgrove* (14 Victorian Law Rep., 349).

The plaintiff in this case was a Chinaman and an immigrant arriving in Victoria, within the meaning of the Victorian acts relating to Chinese. The master of the ship on which the plaintiff arrived offered to pay to the defendant, the collector of customs at Melbourne, Victoria, the sum of ten pounds, as provided in Section 3 of the Victorian Chinese Act of 1881. The defendant refused to allow the plaintiff to land on the ground that the ship on which he had arrived had on board 268 Chinese immigrants, being 254 more Chinese immigrants than under the Chinese Acts of Victoria the said vessel could lawfully bring into the port of Melbourne; and on the ground that he had received instructions from the responsible Minister of the Crown for the Colony of Victoria that in the future Her Majesty's Government had determined to refuse to permit any Chinese, other than such as were British subjects, to land or enter the colony; and that in obedience to such instructions and determination he, by command of Our Lady the Queen, had refused to permit the plaintiff to land in the said colony of Victoria. A suit was brought by the plaintiff to recover one thousand pounds as damages for the refusal on the part of the Collector of Customs to permit him to land, and the majority of the Court held that the plaintiff was entitled to judgment.

To be sure this case turns not upon the question of the prerogative of the Crown to remove a friendly alien resident, but upon the power of the Crown to exclude an alien. The latter question is as far removed from the former as the North Pole is from the South, and a decision against the appellants as to the *exclusion* of an alien is no authority as to the right to *remove* them, but a judgment that there is no power in a goverment to *exclude* an alien is certainly a precedent for the larger propo-

sition that there is no right in the same government to *expel* from its limits a friendly alien resident. That this Goverment has a right to exclude an alien from its borders has already been held by this Court in the Chinese Exclusion Case, 130 U. S., 581, and the case of Nishimura Ekiu vs. United States, 142 U. S., 651. Both cases, however, were decided upon the ground that Congress had the power to do so under the provision of the Constitution which gave them "the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States" (Nishimura Ekiu vs. United States, 142 U. S., 651–9). The Court in the Victorian case above cited held that not only is the right of exclusion not a prerogative of the Crown, which is not so clear as the proposition in this case, viz., that there is no power to remove a friendly alien resident, but in doing so have in the same breath maintained that there *is no prerogative of the Crown to remove in time of peace an alien resident.*

The result of the judgment of the majority of the Court in this case, which is a very long one, each of the six Judges writing an opinion, may be briefly summed up as follows: There was no prerogative of the Crown to exclude an alien resident. If there was such a prerogative of the Crown it was not vested in the Colonial Government of Victoria. There being, therefore, no prerogative of the Crown, or at least no prerogative of the Crown vested in the Colonial Government of Victoria, *it was necessary to look to the Constitution of Victoria for the power to exclude an alien.* Not finding it there, then there was no power under which the Government of Victoria could exclude an alien from its border, and the Court so held.

If a Government, whose powers are established by a Constitution, cannot exclude an alien from its country, unless under some special power given by that Constitution, then all the more is it contrary to the powers of

that Government to remove an alien from its midst, especially after having, as in the case at bar, invited him to take up his residence within its borders.

In the opinion of Judge HOLROYD, page 424, he says:

> "But according to English law no resident in the United Kingdom, whether native or foreigner, can be deported at the arbitrary will of the Executive for any offense alleged against him. For any offense he must be tried, and, if convicted, punished as the law prescribes. * * * But I am very much impressed with the fact *that for nearly three centuries no British sovereign has attempted to exercise the right of expelling aliens or of preventing their intrusion in time of peace by virtue of his prerogative;* and no British minister, not even the strongest advocate in theory for the plenitude of the Royal authority, has even ventured in this matter to reduce his theory into practice."

An appeal was taken from the judgment in this case to the House of Lords (Law Rep. Appeal Cases, 1891, 272); but the Court decided the case upon another point. The Queen's Counsel, however, in his argument at page 278, after stating that, as to the prerogative right to exclude, there was no doubt a conflict of authorities, directly admitted that "*Where an alien was amongst us, and had acquired a certain status, there was no prerogative to turn him out.*"

In the case of *in re* Henry Adam (1 Moo. P. C., 460) it was held that under the French law it might be that a friendly alien resident could be deported at the will of the executive. The opinion of Lord BROUGHAM, however, leaves no doubt but that under the English law the decision would have been directly to the contrary.

The case last cited is referred to in the opinion of Lord HOLROYD, in the case of Chung Teong Toy vs. Musgrove *(supra)*, and no better statement can be made of it than that given by him, which is as follows (p. 424):

"In that case Mr. Adam, an alien friend, had been banished from the Island of Mauritius by order of the Governor and Council under instructions from the British Government; and it was held by the Judicial Committee of the Privy Council that by the law of the island an alien friend could be removed from the island by the Executive Government at its pleasure without having been convicted of any offence, *unless he had procured the permission of the Government to establish his domicile* there. The judgment of the Privy Council proceeded, to use the words of Lord BROUGHAM, 'upon the peculiar provisions of the French law which prevailed in the island,' and would have been just the reverse if the English law had prevailed there. According to the law of France, as it then stood in the island, the executive Government had power to remove any alien *not domiciled by its authority;* and for this reason it was resolved that Mr. Adam could be lawfully deported. He was not removed by force, but went away under pain of being forcibly deported, which was the same thing. French prerogative however was not English prerogative; and the case of *re* Adam furnishes no precedent for ascribing to an English Sovereign a power which had been inherent in the Crown of France and was still existent in the Mauritius as governed by French law. *The judgment, in my opinion, points to a directly opposite conclusion.* To put it in another form, the offense which the foreigner had committed by entering the island illegally could by the French law of the island be punished by the Sovereign or his delegate by deporting the foreigner" (14 Victorian Law Reports, 424).

The opinion of Lord BROUGHAM given on page 477 (1 Moo., P. C.), is as follows:

"It is the opinion of all their Lordships that the case is one of great hardship, and that they are only compelled, and with much reluctance and regret, to give the judgment now pronounced on the ground of the peculiar provisions of the French law. * * *"

Mr. Dicey, the great authority on the English Constitution, says, in his book, at page 341, that:

> "The English executive needs therefore the right to exercise discretionary powers, *but the Courts must prevent, and will prevent at any rate where personal liberty is concerned*, the *exercise by the Government of any sort of discretionary power.* The Crown cannot, except under statute, expel from England any alien whatever, even though he were a murderer who, after slaughtering a whole family at Boulogne, had on the very day crossed red-handed to Dover. The executive therefore, must ask for and always obtains aid from Parliament" (Dicey's Law of the Constitution, 341).

It therefore appears that from the earliest times of which we have a record down to the year 1891 it has been held in England that the power to remove a friendly alien resident was not a prerogative of the Crown.

2.

After the Government of England became a limited monarchy, the sovereign power then resided in the king and Parliament.

In all consideration of this question the difference between an alien friend and an alien enemy must be distinctly borne in mind. That distinction, as is shown by the citations in this brief, has been made since the earliest times. The right of every government to expel alien enemies, under its power of declaring war, whether as a prerogative of the King or a power of the King and Parliament, or a power of the people, or a power given by the people under their Constitution, has always been acknowledged to be the right of a nation. *But, according to English usage down to the time of our Independence, and, in fact, ever since, friendly alien residents in time of peace have the same rights as citizens upon the question of transportation from the confines of the country of their residence.*

A country, by inviting and admitting an alien as a permanent resident, precludes itself, according to the practices of civilized nations, from dismissing him from its borders, except on the ground that it is at war with his nation of origin or as a punishment for a crime. That this has been the ancient usage is shown by the authorities cited by Pufendorff, who says :

> " But having once admitted Strangers and foreign Guests, to turn them out again, unless upon *good Reason*, is usually censured as some Degree at least of Inhumanity. From the number of these *good reasons* St. Ambrose, and with him Grotius, excludes the Case of grievous Scarcity and Dearth afflicting a People. To whose judgment we subscribe with this supposition, that there are still means left, though perhaps very hard and pressing to save both natives and strangers, and if the latter have been formerly, or may be hereafter useful and serviceable to us; and of such only St. Ambrose speaks. But in case we are not *obliged* to the foreigners amongst us, and there be no necessity of their perishing should we send them off, there seems to be no reason why the subject on their account should be content to struggle with a famine" (Pufendorff, Book 3, Chap. 3, Sec. 9).

It therefore seems to have been considered by St. Ambrose and Grotius that a country had no right to exclude a foreigner when once admitted, even to save its native-born population from starvation and death. Pufendorff is not certain on this point. He says, however, in another part of his book in no uncertain language that :

> " As to the question before us, then thus much is certain that if our people are kindly received by any nation abroad, we ought to entertain the men of that nation with an equal return of civility " *(Ibid.)*.

An old Spanish authority, Franciscus de Victora, is quoted by Pufendorff to this effect :

> " The Spaniards had a right of traveling and of living in those countries, provided they did the natives no harm, and from this privilege none could restrain them " *(Ibid.)*.

There may not be much choice between Pufendorff, St. Ambrose, Grotius and Franciscus de Victora, but certainly the weight of the majority should control. Their opinions are well based on the theory of natural justice that when a government admits and invites a man into its country, it does so guaranteeing (as in this case, by special treaty and law) that in all respects he is to be treated as a native-born citizen, except, possibly, in respect to the governing of the country, before he can be permitted to take part in which certain rules and regulations must usually be complied with.

Referring again to the speech of Sir James Mackintosh, it is there said upon this point :

> " In this failure of authority the next resource of the learned advocates of this bill was argument. His learned friend who spoke last had gravely told the House, that the case of aliens differed from that of natural-born subjects in this, that the latter had rights which entitled them in defiance of the Crown to continue within the realm, to which the former could make no pretence. But whence did these rights flow? From the law and from the law alone. *That natural-born subjects had by law such rights against the Crown, that they could be banished by no human power unless they were convicted of a crime was most happily true.* BUT THE VERY QUESTION WAS, WHETHER ALIEN FRIENDS ENJOYED BY LAW THE SAME SECURITY. *The learned gentleman takes it for granted that they do not. He assumes the only point in dispute. There never was a more egregious instance of begging the question. The alien, it is said, has not the same right against the Crown with the native subject; therefore the Crown has that absolute power over aliens which the law only exercises over native subjects.* THIS IS MERELY TO SAY—THE CROWN MAY SEND ALIENS OUT OF THE COUNTRY BECAUSE IT MAY.
>
> " But it was said, that as such a power must exist

somewhere in every State, it can in our constitution be vested only in the Crown, because the Crown alone can conveniently exercise it. This again was a mere fallacy. Undoubtedy a power of dealing with aliens according to the demands of public safety, as well as of doing every other act which an independent commonwealth may lawfully do, is vested in the supreme authority of this realm, which consists of King, Lords and Commons. They may vest in the Crown alone a power to banish aliens, whenever so dangerous a power is absolutely necessary. A power scarcely claimed, not to say exerted, for centuries—a power granted in 1793 professedly on the ground of a danger without parallel in our history, has no need of being permanently placed where its exertion would be always easy and convenient. When the times require it, Parliament may vest in the Crown the dictatorship over aliens. And this is the universal answer of this constitution to such speculative arguments on behalf of inherent prerogatives in the Crown" (34 Hans. (1st Series), 470).

Admitting, then, that there is a power in Parliament to remove a friendly alien resident, it is certain that it had never been exercised before our independence, and that no authentic record of any such power having been exercised—either before or after the adoption of our Federal Constition—can be pointed out. Every time in the history of the English people when an alien bill has been passed, it has been in time of war or time of trouble immediately preceding or subsequent to a period of war, or an occasion of great public disturbance and never has it been aimed at a particular race or class of aliens. In many of the alien acts of England the preambles state the reasons for the passage of the act, and they are always reasons arising out of the fear of war or the fear of public disturbances. There has never been an attempt by the Parliament of England to pass a bill removing alien residents in time of peace; and never have these laws, as a rule, been applied to alien residents of long standing, but they have been limited in

their effect to those aliens who had just come into the country, or who had been there but a short space of time. *Nearly all the laws contain a provision that they shall not apply to an alien of seven years' residence, or in some cases of three years' residence.*

No alien act removing resident aliens in time of peace, or in time of war, was ever passed until after the colonies in this country had separated from England. The first alien bill of England was passed in the year 1793, and Lord Hawkesbury, who moved the second reading of it, *admitted that it was without precedent* (30 Cobbett's Parl. Hist., 159). Therefore, at the time when we derived our law from England, there was no such thing known as the removal from the country of an alien in time of peace. That these alien bills were passed as an exercise of the war power, and not as an exercise of an inherent power in the King and Parliament to remove alien friends, is shown by a quotation from the speech of Edmund Burke on the Alien Bill of 1793, which was used by Lord Aukland while speaking in opposition to the bill in 1816 (34 Hansard, 1st Series, 1059). Burke contended:

> "That the bill was for the purpose of keeping out of the country those murderers and atheists who were solicitous to put down Church and State," and added that "*the power thus given to the Crown would be too great for the liberty of the people, were it possessed in time of peace.*"

Mr. Hobhouse, speaking of the Alien Bill of 1793 in a debate before the House of Commons in 1822, said:

> "All the individuals in both Houses who supported it, declared it was 'a great addition to the power of the Crown, justified only by the emergency and by the right of self-defense'" (7 Handsard, 2d Series, 1435).

Again, on this same point, Lord HOLLAND says:

> "Either the prerogative did or did not exist in the Crown: if it did, this bill was needless, and if it did not, it was not to be denied that until 1792 the country had thriven without it" (7 Hans., 2d Ser., 1853).

All the alien bills of England were limited in time, rarely extending over a period of more than two or three years. The first bill (33 George III., Chap. 4) was followed by the statutes undermentioned, all of which are now repealed:

38 George III., Cs. 50,77.
41 George III., C. 24.
42 George III., C. 92.
43 George III., C. 155.
54 George III., C. 155.
55 George III., C. 54.
56 George III., C. 86.
58 George III., C. 96.
1 George IV., C. 105.
3 George IV., C. 97.
5 George IV., C. 37.

The last alien statute was passed on the 9th of June, 1848 (11 and 12 Victoria, Chapter 20), and was re-enacted in 1882 (18 Statutes Eng. Law Rep., p. 61).

These later acts were to enable the Government to control disturbances in Ireland.

The Alien Act of 1798 is the only example in our history in which Congress has attempted to exercise the right to pass an act authorizing the expulsion of an alien from the United States. This act, however, bears in no way upon the question in this case, it being admitted even by those most strenuous in its support that it was passed under "the war power" given to Congress by the Constitution.

John Adams, who, as President of the United States, approved the bill, and at whose door the responsibility of the act is laid, and who should, if any one, know the circumstances under which this measure was passed, speaks of the law in the course of his voluminous correspondence as follows:

> "But as they [Alien or Sedition Laws] were then considered as war measures and intended altogether against the advocates of the French. * * * "
>
> Volume IX., Works of John Adams, 1854, p. 291.

The same view was taken by Judge COOLEY, who, referring to the Alien bill of 1798, says in his note (1 Cooley's Blackstone, 260):

> "In the United States the president is empowered, *in case of war with any foreign nation*, to impose restraints upon the citizens or residents of such nation who may be within the United States, and to remove them from the country in his discretion."

The same opinion was held at the time of the passage of this measure by the different States who made answers to the Virginia Resolutions of 1798. In the answer of the Commonwealth of Masschusetts, it is said:

> "The removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations. Actual hostility had unhappily long been experienced, and a formal declaration of it the Government had reason daily to expect." (4 Elliot's Debates, 535).

The answer of the State of Connecticut contains these words:

> "'Alien and Sedition Acts'—acts which the Constitution authorized, which the exigency of the country rendered necessary," * * * (4 Elliott's Debates, 538).

The State of New Hampshire, speaking of this bill, said that it was:

> "In the present critical situation of our country, highly expedient." (4 Elliott's Debates, 539).

Whether the act was constitutional or not is irrelevant in this discussion, for if constitutional it was passed under the power of Congress to declare war, as has been shown by the foregoing citations. That it was held to be unconstitutional by many high authorities appears from the Virginia Resolutions of 1798, drawn by Mr. Madison, the Kentucky Resolutions of 1798–99, prepared by Thomas Jefferson, and the very remarkable report of Madison upon the Virginia Resolutions, all of which we call to the attention of the Court and respectfully ask that they should examine the same. They will all be found in 4 Elliott's Debates, 528 *et seq.*

Von Holst, in a note at page 40 in his work on the Constitutional Law of the United States, says:

> "The hated Alien and Sedition Laws, *whose unconstitutionality will scarcely be questioned by any one to-day.*"

c

NO POWER IS GIVEN TO CONGRESS BY THE FEDERAL CONSTITUTION TO REMOVE FRIENDLY ALIEN RESIDENTS IN TIME OF PEACE.

The unvarying course of judicial decision in this Court has been to hold that Congress can pass no law unless the power to do so is given to it by some express power granted by the Constitution, or by some power incident or necessary to the carrying out of an express power granted thereby. In other words, Congress cannot pass any act it chooses, but must look to the Constitution to ascertain if power to do so is given to it therein. If not, then it cannot pass the law. There has never been any case in which the Constitution has been considered by this Court which has departed from this rule, and the question is now, perhaps, beyond all doubt, and removed from the domain of argument. As was stated by Chief-Justice WAITE in the case of *ex parte* Curtis, 106 U. S., 371, 372:

> " That the Government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions ; "

Only once has any suggestion been made that a different doctrine could be applied. The majority of the Court in that case (Legal Tender Cases, 12 Wall., 457), alarmed by the principle advanced by them, at once set to work to find out if it were not possible to discern some power in the Constitution under which the Legal Tender Act could be passed, and this they succeeded in doing. Therefore their doctrine was merely a dictum, and has never been followed by this Court in any reported case.

The idea advanced by the majority of the Court in this case is best stated by Chief-Justice CHASE in his dissenting opinion at page 582 :

> " It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this Court, by the present majority, that the Legislature has any " powers under the Constitution which grow out of the aggregate of powers conferred upon the Government, or out of the sovereignty instituted by it." If this proposition be admitted, and it be also admitted that the Legislature is the sole judge of the necessity for the exercise of such powers, the Government becomes practically absolute and unlimited."

The majority of the Court do perhaps advance this doctrine, but how quickly they returned to the rule which has always guided this Court is shown at page 539, where they say :

> " Before we can hold the Legal Tender Acts unconstitutional, we must be convinced that they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the Government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. *This brings us to the inquiry*

> *whether they were, when enacted, appropriate instrumentaiities for carrying into effect, or executing any of the known powers of Congress, or any department of the Government.* Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the Government then stood, is important."

The Court then holds, at page 541, that the Legal Tender Act then before the Court was passed under the power of Congress to maintain an army and navy, saying :

> "It was at such a time and in such circumstances that Congress was called upon to devise means for *maintaining the army and navy,* for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the Legal Tender Acts were passed."

This doctrine which has so long been followed by the Judges of this Court, is well stated in the dissenting opinion of Judge FIELD in the Legal Tender Case in 110 U. S., 421, 467. There was no dispute among the members of the Court upon this particular question in this case, the majority of the Court having decided that the Legal Tender Act was passed under the power given to Congress to borrow meney, so that the opinion of Judge FIELD upon the question of the the powers of Congress is as valuable as if it were delivered by the majority of the Court, he simply disagreeing with them because he was unable to reconcile him-self to the position that the power to pass a Legal Tender Act was an incident to the power to borrow money.

> " Congress can exercise no power by virtue of any supposed inherent sovereignty in the General Government * * * It is a government of delegated powers, supreme within its prescribed

sphere, but powerless outside of it. In this country sovereignty resides in the people, and Congress can exercise no power which they have not, by their Constitution, entrusted to it; all else is withheld. It seems, however, to be supposed that, as the power was taken from the States, it could not have been intended that it should disappear entirely, and therefore it must in some way adhere to the General Government, notwithstanding the Tenth Amendment and the nature of the Constitution. The doctrine, that a power not expressly forbidden may be exercised, would, as I have observed, change the character of our Government. If I have read the Constitution aright, if there is any weight to be given to the uniform teachings of our great jurists and of commentators previous to the late Civil War, the true doctrine is the very opposite of this. If the power is not in terms granted, and is not necessary and proper for the exercise of a power which is thus granted, it does not exist. And in determining what measures may be adopted in executing the powers granted, Chief-Justice MARSHALL declares that they must be appropriate, plainly adapted to the end, not prohibited, and *consistent with the letter and spirit of the Constitution.* Now, all through that instrument we find limitations upon the power, both of the General Government and the State Governments, *so as to prevent oppression and injustice.*"

For other authorities upon this point, we call the attention of the Court to the cases of

Marbury vs. Madison, 1 Cranch, 137, 176.
Martin vs. Hunter's Lessee, 1 Wheat, 304, 326.
M'Culloch vs. State of Maryland, 4 Wheat, 316, 421, 423.
United States vs. Cruikshank, 92 U. S., 542, 551.
United States vs. Harris, 106 U. S., 629, 636.

If, then, the doctrine advanced by us is still the one adopted by this Court in determining whether an act is

within the power of Congress to pass or not, our next inquiry is whether there is any power given directly or incidentally under the Constitution which would enable Congress to banish alien residents in time of peace. The appellants claim that there is not; that the Government is unable to show under what clause in the Constitution, or as an incident to what power given by the Constitution, this authority vests in Congress. It cannot be claimed that the power to remove these Chinese laborers can come within that power under which the Chinese Exclusion Case (130 U. S.) and the Japanese Case (142 U. S.) were decided. It will hardly be seriously argued by the Government that the power of Congress to enact this measure was given them under the power to regulate commerce with foreign nations.

The very idea and the essential notion carried by the word "commerce" is motion. It is a carrying either of persons or of things, and it is impossible to separate from the word "commerce" this idea.

A better definition is that given by Mr. Justice FIELD, in the case of Gloucester Ferry Company vs. Pennsylvania (114 U. S., 196), where he says, at page 203:

> "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; * * * And it needs no argument to show that the commerce with foreign nations and between the States, *which consists in the transportation of persons and property between them*, is a subject of national character, and requires uniformity of regulation."

Instead of any idea of motion in this case we have directly the reverse. The law does not contemplate and does not bring within its limits any Chinaman except those who have resided here since 1882. This requirement is necessary in order that the Chinaman may be entitled to apply for a certificate of residence, and in the particular cases now before the Court the appellants have been in this country as permanent residents for nearly twenty years. And we confidently submit that if there is a power in Congress to remove a friendly alien resident, it must be some power other than the power to regulate commerce with foreign nations.

We are not unmindful of the frequent declarations on the part of this Court that "commerce" is "intercourse," and that the "regulation of commerce" includes, necessarily, the regulation of intercourse between our own people and those of other nations, in pursuance of which doctrine the decisions in the Exclusion cases have been made; but there is here no question of intercourse with other nations. These Chinese laborers, who are the subject of Section 6, have been imbedded in our own population as inhabitants for more than ten years. They have become a part of our population, and their relations to the rest of our people can no more be treated as intercourse with China than could those of the same number of German, Irish, Swedish or Welsh inhabitants be called intercourse with the countries from which they respectively came. They are, to every intent and purpose, part and parcel of our people, having become so in pursuance of what the Burlingame Treaty called their inalienable right to change their place and their residence.

> "The Courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as

to stamp him with the national character of the state where he resides."

The Venus, 8 Cranch, 253, 279.

If it be claimed that these Chinese laborers are subjects of the Emperor of China because they have not formally renounced their allegiance, we deny it. They are in no sense subject to his power or to be recalled by him to return and resume their original allegiance.

If the Emperor of China should attempt such a recall, it would be treated as a like effort by the Queen of England or the Emperor of Germany to recall their former subjects here, whether naturalized or not, would be treated. Their liberty to remain here, guaranteed by the Constitution not to be taken away without due process of law, would necessarily be protected by the Courts. The guarantees of the Constitution of personal liberty are not limited to naturalized aliens. The right of the unnaturalized alien to invoke them cannot be distinguished from that of the naturalized or the native citizen.

It is true that by the construction given to our naturalization laws Chinese are the only aliens excluded from that right, but their free right to the equal protection of the laws, and to every other constitutional safeguard, is not thereby impaired.

As transactions, commerce, intercourse wholly within the States, have uniformly been held to be beyond the reach of the power given by the Constitution to Congress to regulate commerce between the States, so the presence of these friendly aliens, among and as part of our people, and commerce, intercourse, transactions between them and the rest of our people wholly within our own national territory, is to the same extent, and for the same reasons, beyond the reach of its power to regulate commerce with foreign nations.

The passenger cases, the headmoney cases, all the immigration, restriction and exclusion cases, and finally, the Japanese case, have no bearing upon the present

controversy. There, Congress and the Court were dealing with immigration, the admission of passengers and others into our territory, obviously and necessarily a part of commerce with foreign nations, but when immigrants have ceased to be immigrants, and have been transformed into an integral part of our own population, with the same constitutional rights to personal liberty as native-born citizens, they have escaped beyond the reach of the commerce clause.

The same principle has often been declared by the Court in respect to imports. When they once have become mingled with the internal wealth and trade of the country, they cease to be imports.

Not only is there no such power given to Congress by express grant or by implication, but the 5th amendment is an express and direct restraint upon the exercise of such a power. By that amendment "liberty" is not to be taken away from "*any person*" without due "process of law." It stands decided that the word "person" includes these Chinese laborers, exactly asit does native and naturalized citizens. In respect to this "liberty" which cannot be taken away, they stand on an equal footing with ourselves. What is due process of law to take it away from these Chinese laborers is due process of law to take it away from citizens, and what is not due process of law to take it away from citizens is not due process of law to take it away from these Chinese laborers. In other words, in respect to this thing called "liberty," this provision of the Constitution gives to aliens the same protection that it affords to citizens.

And what this "liberty" is, that is thus warranted alike to both, and that it is and means the same thing to both citizens and friendly aliens, to all the "persons" embraced in the provision, is equally free from doubt. It is the liberty of one's own person, and the free control of one's personal movements—freedom to come or go or stay. Freedom to live and labor where one chooses, within the limits of the United States territory.

This is the inalienable right asserted in our Declaration of Independence—acted on ever since under the Constitution down to this day—mutually stipulated with China in the Burlingame Treaty, and from that time solemnly enacted as a necessary part of personal liberty in our statutes; for §1999, R. S., expressly declares that "the right of expatriation is a natural and inherent right of all people, *indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;* and whereas, in the recognition of this principle, this Government has freely received emigrants from all nations." R. S., §1977, also has stood for more than twenty years as a statutory declaration of the general constitutional right to liberty of all persons lawfully within the jurisdiction. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory, * * * to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

We submit, therefore, that if the right to remain here cannot be taken away from our native and naturalized citizens in time of peace, except as a punishment for a crime, of which they shall be convicted by "due process of law," it cannot be taken away from the Chinese laborers in any other way.

d.

THE APPELLANTS ARE MORE THAN FRIENDLY ALIEN RESIDENTS. THEY ARE DENIZENS OF THIS COUNTRY.

In the discussions on the alien acts of England and in the alien bills themselves, a distinction, clearly drawn, is always made between an ordinary alien resident and a denizen. The alien acts of England *(supra)* invariably excepted from their control a denizen. Perhaps, strictly speaking, there is no such thing as a denizen in the United States, simply because the old definitions of *denizen* required that he should have a

patent from the King. There is no King in this country, and therefore it is impossible to come within the exact terms of the definition, but a patent was never anything more than a permission, and a permission from a republican government is the equivalent of a patent from a king. The Burlingame Treaty between the United States and China was the patent under which the appellants took up their residence here.

The old definition of " denizen " was this :

> " A denizen of England by letters patent for life, entayl or in fee, whereby he becomes a subject in regard of his person " (Craw vs. Ramsey, Vaughan's Reports, 278).

And, again :

> " A denizen is not capable of nobility, or to sit in Parliament ; for to have the power of making laws, it is necessary he should be totally received into society " (Bacon's Abridgment, Title Aliens B).

Blackstone defines a denizen in these terms :

> " A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject. * * * *A denizen is in a kind of middle state, between an alien and a natural-born subject, and partakes of both of them* " (1 Blackstone, 374).

It is further shown by the Constitutions of the States, passed prior to the Federal Constitution, that the people contemplated such an inhabitant as a denizen :

> " Every foreigner * * * after one year's residence, shall be deemed a free denizen " (Constitution of Pennsylvania, 1776, Section 42 ; 2 Poore's Fed. and State Con., 1547).

A similar provision is found in the Constitution of Vermont. And even Sir Edward Northey, quoted above

in the speech of Sir James Mackintosh, held that if "they were aliens, not made denizens nor naturalized, Her Majesty might by law compel them to depart Maryland," (34 Hansard, 443), thus showing that a distinction was made in this country at that time between an alien, a denizen, and a naturalized alien.

It is claimed that the appellants in this case come completely within the definition quoted above. They are alien born, but they have obtained the same thing as letters patent from this country. They occupy a middle state between an alien and a native. They partake of both of them. They cannot vote, or, as it is stated in Bacon's abridgment, they have no "power of making laws," as a native-born subject can, nor are they here as ordinary aliens. An ordinary alien within this country has come here under no prohibition, and no invitation, but the appellants have come under the direct request and invitation and under the "patent" of the Federal Government. They have been guaranteed "the same privileges, immunities, and exemptions in respect to * * * residence" (Burlingame Treaty concluded July 28th, 1868), as that enjoyed in the United States by the citizens and subjects of the most favored nation. They have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guarantee from the Government, and who has come not in response to any invitation, but has simply drifted here because there is no prohibition to keep him out. They certainly come within the meaning of "denizen" as used in the Constitutions of the States.

This selection of the Chinese race from all the mass of aliens in this country to bring under the ban of this law is contrary to the policy of our country and the principles of our Constitution. That instrument breathes in every clause the breath of freedom and

equality. There may not be any sentence in the Constitution directly prohibiting Congress from passing a law discriminating between a Chinese alien and an alien of another race; but, if aliens are to be registered, then all aliens should be included, and not simply Chinamen. Otherwise it is against the spirit of the Constitution, as is shown by the clause forbidding States to so discriminate:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * * nor deny to any person within its jurisdiction the equal protection of the laws" (Fourteenth Amendment).

POINT II.

ASSUMING, THEN, AS WE ARE BOUND TO ASSUME, THAT IT WAS NOT THE INTENT OF CONGRESS, BY THE SIXTH SECTION OF THE ACT, TO EXPEL FROM THE COUNTRY THOSE CHINESE LABORERS WHOM IT DESCRIBES AS "LAWFULLY ENTITLED TO REMAIN IN THE UNITED STATES," BUT ONLY TO CONSTRUCT A SCHEME BY WHICH, AS TO EACH INDIVIDUAL MEMBER OF THAT CLASS, HIS RIGHT AS SUCH MEMBER MIGHT BE ADJUDICATED AND DETERMINED; *AND, COMING TO AN EXAMINATION OF THAT SCHEME IN THE LIGHT OF THE CONSTITUTIONAL GUARANTEES OF PERSONAL LIBERTY, WE SUBMIT THAT IT DEPRIVES THESE PERSONS OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW, IN DIRECT VIOLATION*

OF THE FIFTH AMENDMENT OF THE CONSTITUTION, TO THE PROTECTION OF WHICH THEY ARE UNQUESTIONABLY ENTITLED.

1.

We have already sufficiently insisted that the act contains no language indicative of any purpose, on the part of Congress, to terminate instantly, of its own mere will, the right of these persons to remain, or to revoke the treaty stipulations which guaranteed that right. "When Congress shall choose to declare unequivocally that the privilege of any foreigners who have rightfully come among us is terminated either absolutely or conditionally, a very different question will be presented. Until it does so declare, in language which is susceptible of no other interpretation, it seems to us that it is safe to say, on fundamental principles of statutory interpretation, that an intention to take a step so unusual and extraordinary for a free and civilized nation will not be imputed to that body by any judicial tribunal. * * * Congress must be assumed not to be afraid to express its real designs, and not to be guilty of couching its real intentions beneath ambiguous language, or of reaching its real ends by the practice of indirection." (Opinion of James C. Carter, Esq.). What we have now to deal with is the constitutionality of the scheme which Congress has devised for ascertaining and determining the right which at the outset is conceded to belong to the petitioners and the class of which they are members.

2.

The Act makes it the duty of all these Chinese laborers, within twelve months after its passage, to apply to the Collector of Internal Revenue for a certificate of residence, and if the Collector does not grant

such certificate, they shall be deemed and adjudged to be persons 'unlawfully within the United States.' It cannot be denied that this simple provision gives to the Collector the absolute and arbitrary power to pass upon and determine the status and the right of every applicant. They go before him clothed by the statute with the right and title to remain here, and if he denies the certificate, they come from his presence stripped and denuded of that right, degraded from the class to which they belong, and transferred to the ranks of the outlaws, deprived of their liberty and doomed to immediate transportation, not to their native country, but to any port to which the caprice of the marshal may send them, or as felons under the 4th Section of the act liable to be imprisoned at hard labor. No scope of examination is prescribed to the Collector; he may take any evidence or may take none, in his discretion or pleasure. No power of summoning or examining witnesses is given him. No provision is made for a hearing. The question to be determined by him is obvious, viz.: Is the applicant a Chinese laborer who came to this country prior to ninety days after the passage of the Act of May 6th, 1882, and has he continuously resided here from the date of the passage of the Act of 1888 until the 5th day of May, 1892? This question may involve intricate and difficult problems of law and of fact. But the act gives him no legal means of deciding them. Only out of his own inner consciousness upon inspection he must decide them. He is not bound to hear the applicant in answer to any facts that may be brought against him. Thus, the entire function of adjudication which pertains to a court of justice is devolved upon him, without any of the means which all Courts can command for passing on questions of life, of liberty, or of property. And from his decision there is no appeal; for when he is subsequently arrested and brought before a United States Judge, no power of review of the Collector's de-

cision is given to the Judge, who has no alternative in the ordinary and usual case but to perform the ministerial duty of signing an order for his deportation. It is true that in the rare and wholly exceptional case of his being able to establish clearly to the satisfaction of said Judge that by reason of accident, sickness or other unavoidable cause he has been unable to procure his certificate, and even then only if he is able to further satisfy the Court by at least one credible white witness that he was a resident of the United States at the time of the passage of this act—then, if upon the hearing, it shall appear that he is entitled to a certificate, it shall be granted upon his paying the cost. But with this unusual exception the Judge has no judicial duties or functions to perform. He must simply execute the judgment of the Collector. Thus the judicial determination of the most sacred of all rights is left to a wholly unqualified ministerial officer, and the mere ministerial duty of ordering deportation is left to the Judge.

Again, he who neglects, fails or refuses to apply to the Collector, that is to say, who refuses to submit the determination of his existing right to liberty and to a permanent residence in the country to the decision of such a tribunal is adjudged by the mere will of Congress, as for a default, to stand in the same predicament, as if he had applied and lost his right by the decision of the Collector, and being found within the jurisdiction of the United States without a certificate, he is conclusively deemed and adjudged (by Congress) to have become a person unlawfully within the United States. Any extended argument to prove that this procedure is depriving these Chinese laborers of their liberty, without due process of law, seems unnecessary.

Again, as to what goes on before the Judge in the exceptional case. The arrested man loses his right unless he can produce a *white* witness to prove his residence here at the date of the passage of the act, although it is expressly provided by R. S., § 858, as to all other parties and all other matters that "in the

Courts of the United States no witness shall be excluded in any action on account of color."

Thus the act finds these persons innocent, and without anything that approaches "process of law," much less "due process of law," it leaves them guilty. By its own terms, it converts only those who refuse to apply for the required certificate from persons lawfully entitled to remain in the United States into outlaws and felons—as to those, who apply and are rejected by the Collector, it accomplishes the same result without a hearing; as to those who do have a hearing before the Judge, it nullifies the hearing by applying an unconstitutional and unlawful rule of evidence—and in each instance it deprives them of the rights and modes of trial, which alone are adequate for the taking away of life or liberty.

It has already been held by this Court that Chinamen are entitled to the benefit of the provisions of the Constitution and the laws of the United States (Yick Wo vs. Hopkins, 118 U. S., 356). The head note in this case is as follows:

> "Those subjects of the Emperor of China who have the right temporarily or permanently to reside within the United States, are entitled to enjoy the protection guaranteed by the Constitution and afforded by the laws."

And in the case of *In re* Hoover, 30 Fed. Rep., 51, 54, it was said:

> "A Chinaman, a negro, a Hottentot, a white man, has the right to the protection of the United States within the limits of the country. * * * He may not be deprived arbitrarily of life or liberty, nor can his property be taken without just compensation or due process of law."
>
> To the same effect, see
>
> Parrott's Chinese Case, 6 Sawyer, 349.
>
> Taylor vs. Carpenter, 3 Story, 458.

Therefore, whether the appellants can be removed

from this country by Congress under an inherent power of sovereignty, under a power vested in Congress by the Constitution, or as a punishment for a crime, the procedure by which the expulsion is accomplished must be according to "due process of law."

a.

THE USUAL MEANING OF THE WORDS "DUE PROCESS OF LAW," COMPARED WITH THE PROCESS OF LAW PROVIDED BY THE SIXTH SECTION OF THIS ACT.

Numerous authorities can, of course, be cited to the Court upon this question of what constitutes "due process of law," but for the phase of the subject now under consideration, perhaps the most apt definitions are the ones given by Mr. Justice FIELD in delivering the opinion of the Court in the Case of Hagar vs. Reclamation District No. 108 (111 U. S., 701), and by Mr. Justice BRADLEY in the case of Davidson vs. New Orleans (96 U. S., 97), which are as follows :

> "Undoubtedly where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard;" (111 U. S., 708).

Mr. Justice BRADLEY, in defining "due process of law," said :

> "If found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law'" (96 U. S., 107).

It would seem that these two quotations cover the question. We must then inquire whether, first, the process provided by this section requires any regular course of judicial proceedings and gives the prisoner

any opportunity to be heard; and, second, whether the procedure is arbitrary, oppressive and unjust.

The appellants have been arrested in each case without any warrant whatever. It is left to the discretion of the officers of the Government specified in this sixth section to determine for themselves whether they will make any arrests or not. There is no requirement that they should.

The appellants in the last two cases were taken before a United States Judge. In the second case there was no opportunity to be heard of any kind. The statute did not permit it. There was nothing for the Judge to do except to order that the appellant be deported from the United States. There was no power under which the United States Judge could hear his case. He might, as an individual, have inquired into the circumstances, but not under any authority given him by this section. A hearing, such as it is, can only be given by the Court to the prisoner under certain specified circumstances, which are these: If the prisoner arrested is without the required certificate by reason of accident, sickness, or other unavoidable cause, or if his certificate has been lost or destroyed. In no other case can the Judge, as a Judge, under the section, hear any testimony, but he must order the arrested man to be deported from the United States without ever looking into the question, except as an individual, as to whether the accused was a Chinaman or not, whether he was born in this country or in China, whether he was a laborer, and whether he was without his certifiate by reason of some excuse which might not come under the head of accident, sickness, loss, or other unavoidable cause (if there be any).

The whole question of whether a Chinese laborer, lawfully entitled to remain in the United States, is to have a certificate or not, and whether being without such certificate he is to be deported or not, is put solely and entirely in the hands of a Collector of Internal Revenue. There is no requirement that the

Collector of Internal Revenue should give the Chinese applicant his certificate. He may refuse on the most arbitrary grounds, or on any grounds he pleases, and there is no appeal from his decision and no remedy for the applicant until after arrest, and then only in case the victim happens to know a white man who can testify to his being a resident of the country on the 5th of May, 1892.

This third case presents these questions in a very strong light. The appellant applied for a certificate of registration and it was refused him. Why? Because the Collector arbitrarily decided, no provision requiring it being found in the statute, that no applicant who could only produce members of the Chinese race to show that he was lawfully in the United States could have a certificate of residence, because, as he arbitrarily said, he did not consider that they were credible witnesses, and he therefore would not grant the certificate asked for.

This vesting in the Collector the power to determine these questions is part of the process provided in this case. The applicant, being deprived of his certificate by reason of the arbitrary judgment of the Collector, is liable to arrest, because of such decision by the Collector upon, being found without such certificate. This process certainly merits the words used by Mr. Justice BRADLEY, and must be deemed to be "arbitrary, oppressive and unjust."

It is arbitrary, because it leaves to a Collector of Internal Revenue to determine whether the Chinaman shall be arrested or not.

It is oppressive because it arrests him without warrant, without complaint; simply upon the whim of a United States Marshal, Collector of Internal Revenue or officer of the Customs.

It is unjust because it deprives him, when before the Judge, of proving his case by the only witness, in nine-tenths of the cases, who knows the facts.

And it is "arbitrary, oppressive and unjust," be-

cause in the ordinary case no hearing of any kind is given.

As an illustration of the danger of the arbitrary power placed in the Collector the following quotation from the speech of Sir Samuel Romilly (34 Hansard, 446) is very much to the point :

> " The House of Lords thought proper some years ago (he thought not very constitutionally), to make a standing order, that no bill of naturalization should be read in their House a second time till there had been produced a certificate from the Secretary of State, that the person named in it was a proper subject to be naturalized. The way on which the Secretary of State exercised this discretion at present was, by refusing his certificate in almost all cases, and that for no other reason than that persons naturalized were released from the restraints of alien bills " (34 Hansard, 446).

A better illustration is that given by Mr. Justice MILLER in the case of Chy Lung vs. Freeman, *et al.*, 92 U. S., 275. The plaintiff in error in that case was a passenger on a vessel from China, being a subject of the Emperor of China, and was held a prisoner because the owner or master of the vessel who brought her over refused to give a bond in the sum of $500 in gold conditioned to indemnify all the counties, towns and cities of California against liability for her support or maintainance for two years. The statute of California did not require a bond from *all* passengers landing from a foreign country, but only from certain classes of passengers specifically described as " lewd and debauched women." The statute was, of course, held unconstitutional on a ground entirely irrelevant to this case, but the Judge in the course of his remarks said, at page 278 :

> " It is hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying

passengers, or to compel them to submit to systematic extortion of the grossest kind.

"The Commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws, and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger to twenty, as in this case, or a hundred if he chooses, and say to the master, 'These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women. I have here a hundred blank forms of bonds, printed. I require you to fill me up and sign each of these for $500 in gold, and that you furnish me two hundred different men, residents of this State, and of sufficient means, as sureties on these bonds. I charge you $5 in each case for preparing the bond and swearing your sureties; and I charge you seventy-five cents each for examining these passengers, and all others you have on board. If you don't do this, you are forbidden to land your passengers under a heavy penalty. But I have the power to commute with you for all this for any sum I may choose to take in cash. I am open to an offer; for you must remember that twenty per cent. of all I can get out of you goes into my own pocket, and the remainder into the Treasury of California. * * * It is the master, owner, or consignee of the vessel alone whose bond can be accepted; and so a silly, an obstinate, or a wicked Commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."

And so under the section we are considering, it is possible for the Collector of Internal Revenue to refuse the certificates of residence unless the Chinamen are willing to pay him for them. He is given unlimited power to blackmail, to levy extortion, if he sees fit. He can say, as in the case suggested by Mr. Justice MILLER, "If you do not do this—if you do not pay me this money that I ask—you will be sent out of the country on the 6th of May next." His

judgment, even if he is not a venal man, may be bad, and he may hold that the applicant can only have his certificate under certain conditions which no one else ever would have dreamed of. It is doubtful whether any other Collector besides the Collector of Internal Revenue for the Third District of New York ever required that an applicant should produce witnesses other than Chinamen. Not that he is not right, for if the Court must have a white witness to determine the question of residence of a Chinaman it would seem as if a Collector of Internal Revenue should require it too.

It is only an illustration of how the power given by this section depends entirely upon the whim, the caprice and the honesty of each particular Collector of Internal Revenue.

The objections to the giving to a ministerial officer an opportunity for the exercise of an arbitrary power are also referred to in the case of Yick Wo vs. Hopkins, 118 U. S., 356.

The theory of the statute seems to be to vest in the Collector of Internal Revenue the power of determining, substantially and finally, all those questions upon which the applicant's right to liberty and the pursuit of happiness are to depend. Was he a Chinaman? Was he a laborer? Has he been a resident of the country during the period fixed by the act? Is he one of those entitled by the treaty and previous laws to remain? This would seem in its nature to be judicial power exercised on the part of the United States, and the Constitution expressly provides that the judicial power of the United States shall be vested in the Supreme Court and in such inferior Courts as Congress shall, from time to time establish, and not in Collectors of Internal Revenue. So here is another provision of the Constitution expressly violated by the act.

b.

DUE PROCESS OF LAW IN A PROCEEDING AGAINST A FRIENDLY ALIEN RESIDENT CHARGED WITH HAVING FAILED TO APPLY FOR A CERTIFICATE OF RESIDENCE, OR OF BEING WITHOUT SUCH CERTIFICATE, WHEN REQUIRED TO SO APPLY OR TO HAVE SUCH CERTIFICATE BY THE LAWS OF THE COUNTRY OF HIS RESIDENCE, IS THE GENERAL, USUAL AND ORDINARY PROCESS OF LAW IN SIMILAR CASES.

If, as we insist, the scheme contained in the 6th article for adjudicating and determining the status and right of those Chinese laborers who are lawfully entitled to remain in the United States, and who do apply to the Collector, shall be held to be unconstitutional and void—then it must also be held that the requirement of the act which makes it their duty to apply and stake their liberty upon the arbitrary decision of the Collector is itself, for the same reasons, unconstitutional and void—and that those who neglected, failed or refused to apply, had the right to refuse to do so, and cannot be subjected to a deprivation of liberty and of their right to remain for so refusing. The act is not separated into parts. The whole scheme must stand together if valid, and must all fall together if, as we insist, it is radically and fundamentally unconstitutional.

In determining what is "due process of law" in a given case, the best guide is what has been the usual process in similar cases prior thereto. We find no case in this country where an alien has been required to register and fails to do so. We therefore turn again to the alien acts of England, and find in them that the usual process of law in the case of a man who failed to register when required to do so was to give him a trial, just the same as for any other offense.

In the nineteenth section of 33 Geo. III., Chapter 4, the offender was to be tried "in his Majesty's court of kings bench, or any court of oyer and terminer, gaol

delivery or great sessions, or justiciary court in Scotland;" and nothing was to be done to him until conviction of the offense charged against him.

In the third section of 38 George III., Chapter 50, a person charged with being found without his license was, upon "being thereof lawfully convicted, * * * at the discretion of the Court before whom he or she shall be so convicted," to be punished as therein provided.

It was provided in the ninth section of 7 George IV., Chapter 54, that any person who neglected to make out his certificate, should, "upon conviction thereof before Two Justices of the Peace," be punished as therein provided.

We also call to the attention of the Court the Victorian act of 1855 and the act of British Columbia of 1888, which we shall refer to more at length at page 82 of this brief. These acts are on all fours with our own, being aimed at Chinamen and their registration, and being passed in time of peace. In both of them provision is made for a trial, and no punishment is inflicted until the accused is convicted of the offense charged.

We therefore see that in every case, that we have been able to discover, in which the crime was similar to the one created by this section, it was provided that no punishment could be inflicted for the failure of an alien to obtain a certificate of residence, when required so to do by the laws of the country of his residence, except upon due conviction thereof before a court. In other words, he was given a trial in the same way as he would be given it if accused of any other offense.

It is of particular importance to note that in 43 George III., Chapter 155, it was provided in the 37th section *that all prosecutions against aliens for any offense punishable by transportion for years or for life were to be by indictment or information in certain specified courts.*

c.

THE PROVISION OF THE SIXTH SECTION OF THE ACT REQUIRING THE APPELLANT LEE JOE, WHEN BROUGHT BEFORE A UNITED STATES JUDGE FOR DEPORTATION, TO PROVE TO THE SATISFACTION OF THE COURT BY AT LEAST ONE CREDIBLE WHITE WITNESS THAT HE WAS A RESIDENT OF THE UNITED STATES ON THE 5TH DAY OF MAY, 1892, IS NOT DUE PROCESS OF LAW.

This proposition needs only to be stated and it proves itself. It cannot be due process of law, as known to the Courts of this generation, that an accused shall not have the same freedom, as to the witnesses whom he may call, as the prosecution. A provision to this effect will be found in many of the Constitutions of the States.

It is to be observed that there is nothing in the statute to prevent the Government from proving by Chinamen or negroes that a Chinese laborer is without or has failed to apply for a certificate of residence.

It is hardly necessary to argue that a man is entitled to have as his witness anybody who knows the fact, or is willing to swear to the fact, which he desires to prove. The weight of his evidence is, of course, for the Judge or the jury to pass upon. But a provision that a Chinaman should not be a witness has no more reason in it than a provision that no man shall testify who is over six feet high or who happens to have red hair. It is contended that the Chinese are not to be believed under oath, but if that is to be the test of those who shall testify upon the witness stand, Courts will soon cease to exist. It cannot be supposed for a moment that it would be considered "due process of law" if a white man arrested for murder was prevented from putting on the stand a Chinaman and a negro by reason of their color, they being the only persons who were able to prove that he was innocent of the offence charged against him, and how, then, can it be deemed

to be "due process of law" to prohibit a Chinese laborer, accused of being without a certificate of residence, from showing the facts which will entitle him to be released.

In the case of *ex parte* Virginia (100 U. S., 339), it was held that the not summoning of colored men by a Judge of a State Court to act as grand and petit jurors was in violation of the Fourteenth Amendment of the United States Constitution, declaring that no State shall deprive "any person of life, liberty or property without due process of law," and the decision would seem to be very much in point.

The absurdity of this provision is apparent when it is remembered that the witnesses allowed to prove the substance of the defense of the arrested Chinaman when the opportunity for false swearing is unlimited can be of any color whatever, but that on the matter of secondary importance, viz., the residence of the prisoner in the United States since the 5th of May, 1892, the same witnesses, if other than white, are not allowed to testify, or at least the Judge is not permitted to consider their evidence.

It is a reflection on the ability of the United States Judges. Congress has apparently taken it for granted that they are unable to determine for themselves whether a witness is to be believed or not. The question of residence is to be established to the satisfaction of the Court. Whether it is done by a black man, a yellow man, or a white man, so long as it is to the satisfaction of the Court, is immaterial, and it should have been left to the Judges to determine whether they should believe the witnesses produced before them or not.

A case, of course, can be cited from the reports of California sustaining a statute of California preventing Chinamen from testifying (People vs. Brady, 40 Cal., p. 198). But an examination of the case will only confirm an impartial mind in the opinion that the statute was unconstitutional, especially if read in connection with the prior case in 36 Cal., 658, of People vs. Wash-

ington and the subsequent case of People vs. McGuire, 45 Cal., 56.

In the latter case, the Court below refused to be bound by the decision in 40 Cal., saying that, in their opinion, the statute was unconstitutional. The Court of last resort, though reprimanding the lower Court for not following their former opinion, seemed desirous of changing it, were it not that the statute before them was to expire by limitation within a few months, and therefore they decided not to examine the matter more carefully.

Further details in which the act deprives the appellants of liberty without due process of law are stated in the next point.

POINT III.

THE ONLY OTHER CONSTRUCTION OF WHICH THE SIXTH SECTION OF THE ACT IS CAPABLE, IS THAT IT IS AN ATTEMPTED EXERCISE BY CONGRESS OF AN ALLEGED POWER TO EXPEL FRIENDLY ALIENS FROM OUR SOIL, APPLIED TO ALL CHINESE LABORERS WHO SHALL BE FOUND WITHOUT A CERTIFICATE OF RESIDENCE—ALTHOUGH THEY ARE STILL PERSONS LAWFULLY ALLOWED TO REMAIN HERE; THAT IS TO SAY, THAT IT IS AN INTENDED REVOCATION OF THE RIGHT TO REMAIN HERE, AND AN EXPULSION CONDITIONED ON THEIR BEING FOUND HERE WITHOUT A CERTIFICATE. IF THE COURT, CONTRARY TO OUR CON-

TENTION, IS CONSTRAINED TO IMPUTE TO CONGRESS SUCH A CRUEL AND BARBAROUS INTENT—WE SUBMIT.

FIRST. That such an enactment is beyond the power of Congress for the reasons stated in our first Point.

SECOND That in the manner of its attempted exercise it violates all the Constitutional safeguards already relied upon.

THIRD. That even so, even under this construction, Congress does not by this act attempt or pretend to banish these people at its mere will and pleasure, it attempts to exercise the power claimed only in the manner in which alone we have insisted it can ever be exercised, viz., as a punishment for a crime and in the mode adopted for thus exercising the power, it clearly violates the third article of the Constitution, and the fourth, fifth, sixth and eighth amendments, to the protection of which the petitioners are clearly entitled.

To accomplish its object, Congress creates and defines an offense against the United States, which must be conceded to be within its power to do. The offense thus created and defined is "refusal or neglect to perform the duty of applying for a certificate" or "being found within the jurisdiction of the United States without a certificate," and then it imposes the punishment of a forfeiture of the hitherto acknowledged right to remain here, to be inflicted by summary deportation.

On the possible construction of the act now being considered, it is not as the result of a judgment of the Collector depriving them of their hitherto acknowledged right to remain, but as a penalty for the commission of the offense, that they are to be deprived of that right.

No one can contend that between the commission of

the offense and the execution of the penalty of deportation, there is any pretense of "due process of law" whatever. The punishment follows the crime instanter, nothing intervening but the arrest, and the immediate order of deportation, and so the Fifth Amendment is violated.

But every step of the procedure tramples upon a distinct constitutional right. Each one of the first eight amendments (quite as much as the Fifth), and each clause of each of them, was ordained by the people for the benefit of every person within the limits of the United States. They were prepared by Madison, and framed to express more clearly the limits set to the powers already delegated by the Constitution itself to the Federal Government. They were designed to protect, not citizens only, but all "persons" within the limits of the United States from oppression at the hands of the Federal Government. Freedom of religion, of speech and of the press, the right to assemble and to petition for redress, the right to keep and bear arms, the right to be secure in *persons*, houses, papers and effects against unreasonable searches and seizures, and all the securities and safeguards to persons charged with crime—the right to a trial by jury and against cruel and unusual punishment—each and all of these sacred provisions are interposed against the Government of the United States to protect from its possible cruelty and oppression, not citizens merely, but all persons within its jurisdiction, excepting only negro slaves, who were once held by this Court to have no rights under the Constitution, which white men were bound to respect, until the Fourteenth Amendment included them also within these benign provisions, and made the Constitution applicable to all alike, irrespective of color, and whether they were citizens or alien residents.

By the arrest, the Fourth Amendment is grossly violated.

> "The right of the people to be secure in their person, * * * against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the * * * persons * * * to be seized."

But this act provides for a seizure of the person, and these petitioners were actually seized without oath, affirmation or warrant, upon no showing of probable cause, at the wanton instance of a Deputy Marshal who is not required to arrest, but may do so at his pleasure. Perhaps authority from the Secretary of the Treasury might have been had, but none such appears, and that would have made it no better. The arrest also necessarily involves a search of his person for the certificate, which the act requires him never to be without.

Who will contend that this is not an "unreasonable search and seizure of the person?"

Again, the Fifth Amendment provides: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury."

This Court held in *Mackin vs. The United States*, 117 U. S., 348, 351, that the test (of an infamous crime there described) was whether the crime was one for which the statute authorizes the Court to award an infamous punishment; that the Constitution, protecting every one from being prosecuted in a Court of the United States without the intervention of a Grand Jury for any crime, which is subject by law to an infamous punishment, no declaration of Congress was competent to defeat the constitutional safeguard; also that "what punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another; and for more than a century, imprisonment at hard labor in a State prison or penitentiary has been considered an infamous punishment, in England and America."

In that case the penalty imposed by the act was imprisonment at hard labor in the penitentiary for not exceeding two years.

Here the punishment is "transportation for life," and transportation for life has always been, and must always be, considered an infamous punishment. In fact, imprisonment at hard labor at home was originally adopted by the British Government as a mere substitute for transportation beyond seas.

Encycl. Brit., 9th Edn., Vol. XIX., p. 748.
Prison Discipline.

And the Court will not forget that the result of the offense by the statute is *ipso facto* that the person is degraded to the condition of a felon, liable by the Fourth Section to imprisonment at hard labor.

Again the Sixth Amendment is grossly violated here.

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

But this act proceeds directly to inflict the punishment immediately upon the offense, without any trial, without any jury, without any accusation, without an opportunity to the accused to confront the witnesses against him, or to produce witnesses in his defense or the assistance of counsel.

And, finally, the Eighth Amendment provides that "cruel and unusual punishment shall not be inflicted."

But the punishment of transportation for life for the offense of being found without a certificate, or for refusing to apply for one, is in the highest degree both cruel and unusual.

That deportation from a country has always been

looked upon as possible as a punishment for a crime was held by Judge DEADY in the case of *in re* Yung Sing Hee (36 Fed. Rep., 437), where he says at page 439 :

> " Banishment or exile is a recognized mode of punishment. (Rap. & L., Law Dict., ' Banishment.') "

Mr. Justice FIELD, in the case of *In re* Look Tin Sin (21 Fed. Rep., 905, 910), held :

> " No citizen can be excluded from this country except in punishment for a crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress."

In Vattel we find that :

> " Banishment is only applied to condemnations in due course of law."
>
> Note to § 228 in 1 Vattel.

That this punishment is cruel will hardly be denied ; and its cruelty is best stated in the following quotation from the report of James Madison on the Virginia Resolutions of 1798, where he says (4 Elliot's Debates, 555).

> " If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections ; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind ; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for ; * * * If, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualities incident to a crisis of war and of unusual licentiousness on that element, *and pos-*

sibly to vindictive purposes, which his immigration itself may have provoked;—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

Vide also Sir James MacKintosh's speech already cited, in which he says that the penalties in every alien act are imposed as a punishment for an offense.

A punishment must, of course, be in some relation and proportion to the crime, and the crime in this case is certainly of the most trivial character. On the other hand, the punishment of transportation has always been considered as one of the most severe known to the law, and to be exercised only under the most extraordinary circumstances as a proper punishment for some crime of violence or for the crime of treason.

The Government of this country no doubt has a right to pass a law requiring all aliens to register, and it has a right to punish said aliens for refusing to register; but we say that such a punishment must be proportionate to the crime of failing to apply for a certificate of residence; and, that unless it is so, unless there is some commensurate relation between the offense and the punishment, that then the punishment must be considered cruel. A punishment which would be proper for an offense of great magnitude, becomes cruel when applied to a crime of little moment.

That the punishment is unusual is very apparent from a consideration of legislative provisions similiar to the one in question and the punishments, which have been usually provided for a failure to comply therewith.

The acts passed in England relating to the registration of aliens, which contain similar provisions to the sixth section of the Chinese bill under discussion are as follows:

33 Geo. III. C, 4; 38 Geo. III. C, 50.
43 Geo. III. C, 155; 7 Geo. IV. C, 54.

All of the above acts have been repealed, and the only act relating to the registration of aliens now in force is 6 & 7 Will. IV., c. 11.

Taking these acts in the order of their enactment, it will be seen that the punishments imposed for failing to register grew less and less.

By the nineteenth section of the first act (33 Geo. III., c. 4) the punishment provided for the first offence of failure to register was, on conviction thereof, *imprisonment for any time not exceeding one month.* For the second offence, it is true, that, after conviction thereof, the defendant was "adjudged to depart out of this realm within a time to be limited * * *"

In the third section of 38 George III, Chapter 50, it was enacted :

> "That if any person, being an alien, shall be found at large in Great Britain after the time in any such proclamation to be limited for obtaining such license as aforesaid, * * * such person being thereof lawfully convicted, shall and may, at the discretion of the Court before whom he or she shall be so convicted, be adjudged to suffer imprisonment for any time not exceeding one year, or to be transported beyond the seas for any time not exceeding seven years."

It was required by the 22d and 23d Sections of 43 George III., Chapter 155, that aliens should register and obtain licenses of residence, and, upon their failure to do so, such aliens being found without a license after a certain time were, after being lawfully convicted thereof, and at the discretion of the Justices of the Peace before whom convicted, to be imprisoned for any time *not exceeding six months.*

The Ninth Section of 7 George IV., Chapter 54, is as follows :

> "And be it further enacted, that if any alien in any of the cases aforesaid shall neglect to make such declaration as is by this act required, or to transmit the same, in the cases in which he is re-

> quired so to do, within the time in that behalf limited, * * * every person so offending shall, upon conviction thereof before two Justices of the Peace, for every such offense, either forfeit any sum not exceeding fifty pounds, or be imprisoned for any time not exceeding six months, at the discretion of such Justices."

By the alien registration act now in force (6 and 7 William IV., Chapter 11) it is required that every alien arriving in any part of the United Kingdom from foreign parts, shall declare in writing various facts to the chief officer of the customs at the port of debarkation; and if any alien so coming into England shall neglect or refuse to make such declaration " he or she *shall forfeit the sum of two pounds.*"

This last citation is of course not identical with the case at bar, but there is no statute now in force in England similar to this Chinese Act. The provision, however, of the act last quoted is akin to the provision contained in our law.

We, therefore, submit that the punishment of transportation is an unusul punishment for the failure of an alien to register when required by law so to do. It is true that for a second offense in 1793, he could be transported; but it must be clearly borne in mind that that act was an act passed under the war power and as against an alien enemy, *and was for a second offense,* the punishment for the first offense being but a month's imprisonment. The same is to be said of the punish- of transportation of seven years, *which was an alternative punishment* to be exercised at the discretion of the Judge before whom the defendant was convicted. The other punishment was imprisonment for one year.

But coming to more modern times, it is seen that though the acts containing these provisions were passed under the war power, yet the punishment for failing to register is reduced to six months or a fine of fifty pounds, or *under the present English Alien Regis-*

tration Act for an almost identical offense the small penalty is inflicted of but two pounds.

An act passed by the Victorian Government entitled "An Act to make provision for certain immigrants" (12th June, 1855; 1 Vict., Acts of Council, 714), and which related solely to Chinese immigrants, provided in the 6th section thereof as follows:

> "It shall be lawful for the Governor with the advice aforesaid *to make such rules and regulations as may be deemed necessary for the registration of such immigrants* on their arrival at the district or place to which they may proceed." * * *

The 9th section then goes on to say that:

> "If any such immigrant * * * shall be guilty of any breach or infringement of any such rule or regulation as aforesaid every such immigrant shall *on conviction, forfeit and pay a penalty not exceeding five pounds or at the discretion of the convictiong justices be subjected to imprisonment for any period not exceeding two months.*"

This statute we cite to the Court as in keeping with the spirit of the present day. It is directed against the same race that ours is, provides a punishment for the same offense, and was passed under similar circumstances, *i. e.*, not under a war power. Under it the Governor could require the Chinamen to register, and upon their failure to register, what happened? Were they transported from the country? No, they were tried, and, if convicted, merely imprisoned for two months at the most, or a maximum fine was imposed of twenty-five dollars. Never both.

Coming still nearer to the time of the passage of our Chinese Bill we find the "Chinese Regulation Act" of British Columbia passed in 1888 (1 Stat. of Brit. Columbia, 99), and in the 5th Section thereof is the provision that:

> "Any Chinese who shall be found within the Province not having in his possession a license issued under the provisions of this Act, lawfully issued to him, shall *on conviction thereof forfeit and pay a sum not exceeding forty dollars.*"

We leave this point without further remark, as we think that the light punishments imposed by the two statutes last cited (the only ones identical with our law now in force) create a precedent that must be conclusive upon the point that transportation for the crime of failing to register is an unusual punishment for such an offense.

POINT IV.

THE APPELLANTS BY THE SIXTH SECTION OF THIS ACT ARE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND SAID SECTION IS THEREFORE UNCONSTITUTIONAL.

Under the procedure created by this section the arrested man is to be deported at once. No opportunity is given him to close up his affairs, to cash his assets, and arrange his business. He is sent at once from the country. He may be a landed proprietor, although a laborer. He may have his money invested in some mercantile pursuit along with others of his race in the same difficult position as himself. By the laws of various States he is entitled to hold land, as was held in the case of State vs. Preble, 18 Nevada, 251. It would seem therefore that the deportation of the Chinaman without time to dispose of his property is clearly a violation of the Constitution forbidding that any person should be deprived of his property without due process of law.

A similar question came up under the provision of the Fourteenth Amendment which is identical with the provision of the Fifth Amendment of the Constitution on this point. In the case of *In re* Lee Sing *et al.*, 43 Fed. Rep., 359, the statute under consideration was a statute of California, the third section of which was as follows :

> " Within sixty days after the passage of this ordinance all Chinese now located, residing in or carrying on business within the limits of said City and County of San Francisco shall either remove without the limits of said City and County of San Francisco or remove and locate within the district of said City and County of San Francisco herein provided for their location."

Section 4 reads :

> " Any Chinese residing, locating, or carrying on business within the limits of the City and County of San Francisco contrary to the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not exceeding six months."

Judge SAWYER, in his opinion, says, at page 361 :

> " This, besides being discriminating, against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them of it, without due process or any process of law."

POINT V.

THE THIRD ARTICLE OF THE CONSTITUTION IS CLEARLY VIOLATED IN THREE RESPECTS BY THE SIXTH SECTION OF THE ACT —1ST. IN THAT IT ATTEMPTS TO VEST EXECUTIVE POWER IN "A UNITED STATES JUDGE," WHEREAS ONLY JUDICIAL POWER IS TO BE VESTED IN THE COURTS OF THE UNITED STATES. 2D. SO FAR AS IT CONFERS JUDICIAL POWER IT ATTEMPTS TO CONFER IT UPON AN INDIVIDUAL JUDGE OF NO PARTICULAR COURT AND NOT IN ANY COURT, AND ALSO IN A COLLECTOR, AN EXECUTIVE OFFICER. AND 3D. BECAUSE THE THIRD ARTICLE PROVIDES THAT THE JUDICIAL POWER SHALL EXTEND ONLY TO "CASES," AND WHAT IS TO BE BROUGHT BY THE ACT BEFORE A UNITED STATE JUDGE IS NOT A "CASE."

In the majority of the cases which can come before the Judge under this act he has only power to act as a ministerial officer. In certain specified cases he has, of course, the power to make an examination and decision, in doing which he may be said to exercise a judicial function.

But in the ordinary case there is nothing for him to do except to perform a merely ministerial act without the exercise of any judicial judgment or any discretion—he is simply to go through the mere formal act of signing an order, whether he thinks it right or wrong, directing the arrested man to be deported from the country. If there is any judicial power of any kind to be exercised

under the provisions of this section, it is the power which has been placed in the Collectors of Internal Revenue. The usual course has been reversed, and an executive officer has been exalted to the position of a judicial one, and a judicial officer has been degraded to the place of an executive magistrate. The Collector of Internal Revenue is the man who determines whether the applicant shall have his certificate or not, and by that determination he subjects the Chinese laborer to arrest.

That a power, the exercise of which is not judicial, is, when placed in the Court or in the Judges thereof, unconstitutional, has been held without a single deviation that we can find from the time of Hayburn's Case (2 Dallas, 409).

The point is better brought out in the case of United States vs. Yale Todd, which is found in a note by the Chief-Justice, inserted by an order of the Court, at the end of the case of United States vs. Ferreira (13 How., 40, 52). The facts as stated there are these :

> "In pursuance of this Act of Congress, the case of Yale Todd was brought before the Supreme Court, in an amicable action, and upon a case stated at February Term, 1794.
>
> "The case was docketed by consent, the United States being plaintiff and Todd the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit*.
>
> "The case as stated, admitted that on the 3rd of May, 1792, the defendant appeared before the Hon. JOHN JAY, WILLIAM CUSHING, and RICHARD LAW, then being Judges of the Circuit Court held at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit

Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as Commissioners designated in the said Act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two-thirds of his former monthly wages, which they understood to have been eight dollars and one-third per month, and the sum of one hundred and fifty dollars for arrears.

"The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792."

A judgment was then entered for the United States for $172.91 and six cents costs. The case was docketed by consent in the Supreme Court, and the result of the opinion expressed by the Judges of the Supreme Court is this:

"1. That the power proposed to be conferred on the Circuit Courts of the United States by the Act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the Courts.

"2. That as the Act of Congress intended to confer the power on the Courts as a judicial function, it could not be construed as an authority to the Judges composing the Court to exercise the power out of court in the character of Commissioners.

"3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States."

The act which imposed the powers upon the Court and the Judges thereof which were discussed in the above cited case is to be found in 1 United States Statutes at Large, p. 243, the second section of which provided that certain persons who had been disabled in the actual service of the United States should receive a certain sum as arrears of pensions "as the Circuit Court of the district in which they respectively reside may think just." At the close of this section it was provided that :

> "The Circuit Court, upon receipt of the proofs aforesaid, shall forthwith proceed to examine into the nature of the wound, or other cause of disability of such applicant, and having ascertained the degree thereof, shall certify the same, and transmit the result of their inquiry, in case, in their opinion, the applicant should be put on the pension list, to the Secretary of War, together with their opinion in writing, what proportion of the monthly pay of such applicant will be equivalent to the degree of disability ascertained in manner aforesaid."

By the third section of this act, these same powers were conferred upon the Judge of the District Court.

Upon this point we also cite the case of United States vs. Ferreira (13 How., 40).

This case was similar, though not arising under the same law, to the one last quoted, and Chief-Justice TANEY, speaking of the duties imposed by the act before him upon the Judges of the United States Courts, said, at page 51 :

> "The duties to be performed are entirely alien to the legitimate functions of a Judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on Judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the Government, the power of appointment is in the President, by and

> with the advice and consent of the Senate; and Congress could not by law, designate the persons to fill these offices. And, if this be the construction of the Constitutson, then as the Judge designated could not act in a judicial character as a court, nor as a Commissioner, because he was not appointed by the President, everything that has been done under the Acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made, might be recovered back by the United States."

In the case of Murray's Lessee *et al.* vs. Hoboken Land and Improvement Co., 18 How., 272, 284, the Court says:

> " To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty ; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."
>
> See also Gordon vs. The United States, 2 Wall., 561, and the opinion of TANEY, C. J. in the same case, printed in 117, U. S. 697

The result of an examination of these cases, which seem to have been followed by this Court up to the present time, is that an act which assigns to a Court or the Judges thereof a duty which is not judicial, is in violation of the Constitution, which has placed the judicial power in the Courts and not in Congress, and under which the judicial power of the United States has been vested in one Supreme Court and in such inferior Courts as Congress shall establish. That is to say, this Act is an attempt on the part of Congress to exercise in itself a judicial power through an executive officer, and to compel the Courts to take a subordinate position and act only in a ministerial capacity.

a.

Again, the judicial power of the United States extends only to "*cases*" arising under the Constitution and laws of the United, and to the other "cases" recited in the article.

What is brought before the "United States Judge" by the terms of this act, is, in no possible sense a "case" within the meaning of this article of the Constitution. It is only the body of a Chinaman. No complaint, charge, accusation, information or indictment accompanies the body. No report from the Collector, if he has refused a certificate, is required. There is nothing which, in any sense, can constitute or be the subject of a record. Only the body of a Chinaman is brought before the Court by the Marshal, who apparently, *viva voce*, is to inform the Judge that he has found the body with no certificate upon it. This cannot constitute a "case" within the meaning of the Constitution, and the act must be void for that reason.

On this point Chief Justice MARSHALL, in the case of Osborn vs. U. S. Bank, 9 Wheat., 738, 819, says:

> "This clause (Third Article of the Constitution) enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

In the case of Home Ins. Co. vs. Northwestern Packet Co., 32 Iowa, 223, 239, the Court holds that:

> "*Proceedings are necessary to create a case and enter into the idea expressed by the term.* When we

> speak of a case at law, in Chancery or in Admiralty, we mean a judicial question submitted to a Court of one jurisdiction or another, according to the form of proceedings prescribed by law."

And again, the reasons for the limitation of the meaning of the word "cases" is stated as follows:

> "The use of the word 'controversies' in the latter part of the section, in the place of the term 'cases,' before used, cannot fail to attract observation. It is broader in its meaning than the term it supersedes, especially as that term is qualified, when first and last used, in the section under consideration. It is not improbable that it is used for this reason. * * * But, for whatever reason the word 'controversies' is used, it appears to us to be of more general and extensive import, so far as it relates to the occasion for the exercise of power, than the other word 'cases' used for the same purpose." *Ibid.*, 238.

This view of the meaning of "case" is also sustained by the following quotation:

> "The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action."
>
> Blyew vs. United States, 13 Wall., 581, 595.

b.

So far as the provisions of the 6th section of the act may be held to confer upon a "United States Judge" judicial power in making an examination and decision on the question of loss, sickness, accident or unavoidable cause, they are further obnoxious to the 6th Article of the Constitution, which requires the judicial power to be vested in the Supreme Court and in such inferior courts as Congress shall establish, and not in the in-

dividual Judges as distinguished from the Courts. "A United States Judge" must be found, no matter what kind of a United States Judge. It may be indifferently a Judge of this Court, or of the Court of Claims, or of the Circuit Court of Appeals, or of a Circuit or District or Territorial Court, or of the District of Columbia, and no matter where he is caught or intercepted. The only requisites are that the Chinaman must be found anywhere "within the jurisdiction of the United States," and taken before a "United States Judge," not before any United States Court; and it is the "said Judge," and not any Court to "whose satisfaction it must appear that by reason of accident, sickness or other unavoidable cause he has been unable to procure his certificate;" and, although the further matter of the residence at the time of the passage of this act must be proved "by at least one credible white witness to the satisfaction of the Court," it does not specify what Court, and evidently means the same Judge, and not any Court at all, for it is the Judge and not any Court whatever that is to make the deportation order, or the decision on which it is based. It is confidently submitted that this method of vesting judicial power in a United States Judge of no particular court is wholly unwarranted.

POINT VI.

THE SECTION OF THE ACT UNDER DISCUSSION IS, IN EFFECT, A BILL OF ATTAINDER, AND IS UNCONSTITUTIONAL AS A VIOLATION OF SUBDIVISION THREE, SECTION NINE, ARTICLE ONE, OF THE CONSTITUTION..

This provision of the Constitution is, as far as this case is concerned, to all intents and purposes the same as the provision of the Fifth Amendment, that no person shall be deprived of his liberty without due process of law.

The definition of a bill of attainder is given by Judge Deady in the case *In re* Yung Sing Hee (36 Fed. Rep., 437), in which he says at page 439, that "a bill of attainder is a special act of the legislature, which inflicts punishment without a judicial trial."

And, again, in the case of Cumings vs. State (4 Wall., 277), Mr. Justice FIELD says, at page 323:

> "A Bill of Attainder is a legislative act which inflicts punishment without a judicial trial.
>
> If the punishment be less than death the act is termed a bill of pains and penalties. Within the meaning of the constitution, bills of attainder include bills of pains and penalties."

And Judge HARE says:

> "The definition of a Bill of Attainder would seem to be a law inflicting punishment directly without the intervention of a Court" (1 American Constitutional Law, 550).

POINT VII.

THE POWER, SOMETIMES CALLED A POLICE REGULATION, DOES NOT RESIDE IN CONGRESS.

The dismissal of the writs of *habeas corpus* in these cases cannot be sustained on the ground that the sixth section is a police regulation. Police regulations are not within the power of Congress, except over the territory exclusively within its jurisdiction, and this proposition is now no longer doubtful, and is well illustrated by the case of United States vs. Dewitt, 9 Wall, 41, where it was held that the 29th section of the Internal Revenue Act of March 2, 1867 (14 Stat. at Large. 484), was in fact a police regulation, and that, therefore, it could have no effect, except where the legislative authority of Congress excludes all State legislation, as for example in the District of Columbia, the Court, saying at page 45 :

> "As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this Court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

The following cases are to the same effect :

License Cases, 5 Howard, 504, 631, 632.
Fertilizing Co. vs. Hyde Park, 97 U. S., 659, 667,
Mugler vs. Kansas, 123 U. S., 623.
City of New York vs. Miln, 11 Peters, 102, 139.

United States vs. Cruikshank, 92 U. S., 542.
Leisy vs. Hardin, 135 U. S., 100, 127.
Prigg vs. Commonwealth of Pennsylvania, 16 Peters, 539, 625.
Brown vs. State of Maryland, 12 Wheat., 419, 443.

VIII.

THE ORDERS REMANDING THE PETITIONERS AND APPELLANTS SHOULD BE REVERSED WITH COSTS, AND THE DISCHARGE OF THE APPELLANTS ORDERED.

JOSEPH H. CHOATE,
MAXWELL EVARTS.
Of Counsel for Appellants.

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Office Supreme Court U. S.
FILED.
MAY 10 1893
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1892.—Nos. 1345, 1346, 1347.

FONG YUE TING, Appellant,

vs.

THE UNITED STATES et al., Respondents.

WONG QUAN, Appellant,

vs.

THE UNITED STATES et al., Respondents.

LEE JOE, Appellant,

vs.

THE UNITED STATES et al., Respondents.

Appeals from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE APPELLANTS.

J. HUBLEY ASHTON,
Of Counsel for Appellants.



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THE UNITED STATES ET AL., RESPONDENTS.

Appeals from the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE APPELLANTS.

These are appeals from the decisions of the Circuit Court of the United States for the Southern District of New York in cases of *habeas corpus* under the provisions of chapter 13 of title 13 of the Revised Statutes.

The cases before the Court involve and present the general question whether or not the enactment in the sixth section of the act of Congress of May 5, 1892, chapter —, entitled "*An act to prohibit the coming of Chinese persons into the United States*," is a valid exercise of the powers possessed by Congress under the Constitution of the United States.

The petitioner in each of these cases is a Chinese laborer lawfully residing in New York at the time of the passage of that Act, and entitled to remain in the United States.

The petitioner, in the first case, intentionally neglected and failed to apply to the Collector of Internal Revenue of his District for a "certificate of residence," and was found without such a certificate, and having been arrested by the marshal, at once and before being taken before a United States Judge, under the Act, obtained from the Circuit Court a writ of *habeas corpus*, which was subsequently dismissed.

The petitioner, in the second case, intentionally neglected and failed to apply to the Collector of Internal Revenue of his District for a "certificate of residence," and being found without such a certificate was arrested by the marshal and taken before a United States Judge, who ordered that he be deported from the United States.

In the third case, the petitioner applied to the Collector of Internal Revenue of his District for a "certificate of residence," which was refused by that officer upon the ground that the witnesses produced by the petitioner were not credible witnesses because they were persons of the Chinese race. The laborer being found without a "certificate of residence," was arrested by the marshal, and taken before a United States Judge. Having proved that he was without a certificate of residence by reason of an unavoidable cause, he at-

tempted to prove by himself and his Chinese witnesses that he was a resident of the United States at the time of the passage of the act of May 5, 1892; but the Judge, notwithstanding the evidence offered to prove such fact of residence, ordered that the man be remanded to the custody of the marshal, and that he be deported from the United States.

The sixth section and the subsequent sections of the act of 1892 are as follows:

SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the Collector of Internal Revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, Collector of Internal Revenue or his deputies, United States Marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge, that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such

cases, the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge.

SEC. 7. That immediately after the passage of this act, the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable Collectors of Internal Revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants. Such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence, and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the Collector of Internal Revenue for the district within which such Chinaman makes application.

SEC. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars or imprisoned in the penitentiary for a term of not more than five years.

SEC. 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the Collectors of Internal Revenue, for services performed under the provisions of this act in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

The act of May 5, 1892, is a product of that vicious system of legislation by reports of conference commit-

tees in which so many objectionable, imperfect, and obscure enactments have had their origin.

It appears that in view of the prevailing opinion in the Senate that the Restriction Act of May 6, 1882, as amended by the act of July 5, 1884, would expire on the 6th of May, 1892, and not on July 5, 1894, the Senate passed a bill reported from its Committee on Foreign Relations, known as the Dolph bill, which provided, in its first section, that all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, were continued in force for a period of ten years, and contained four other sections which were in substance the same as sections 2, 3, 4, and 5 of the present act of 1892.

The House of Representatives, instead of taking up and amending the Senate bill, passed, under a suspension of the rules, on April 5, 1892, a bill, reported by its Committee on Foreign Affairs, known as the "Geary Bill," which, among other extraordinary provisions, declared, by its 14th section, "that all acts and parts of acts inconsistent herewith be repealed, and the provisions of *all treaties now in force between the United States Government and the Chinese Empire, in so far as they, or any of them, conflict with the provisions of this act be, and the same are hereby, abrogated, set aside and repealed.*" (Congressional Record, 52d Cong., 1st sess., p. 3088.)

The distinguished chairman of the Committee on Foreign Relations of the Senate, referring to this bill, in debate, said: "It seems to me that in severity of language and in its prohibition of the ordinary rights of humanity it goes beyond any bill that probably was ever introduced into the Congress of the United States." (*Ibid.*, p. 3859–60.)

The Senate Committee on Foreign Relations, when it received the Geary bill, reported it with an amend-

ment to strike out all after the enacting clause, and insert instead of it the five sections of the original Senate bill. (*Ibid.*, p. 3855.)

The bill in this shape passed the Senate, and was sent to the House. This action resulted in a conference committee, which manufactured and reported, in a few days, a composite bill made up of the five sections of the original Senate bill, and four *new* sections which appear now as sections 6, 7, 8, and 9 of the present act of May 5, 1892. (*Ibid.*, p. 4256.)

The committee, in other words, adopted the bill sent to the House by the Senate, and tacked to it four original sections probably devised by the author of the Geary bill.

The chairman of the Senate Committee on Foreign Relations, who was a member of the conference committee, could not reconcile it to his judgment or his conscience to sign the report. (*Ibid.*, p. 4299.)

Senator Sherman said that while he was disposed to provide for legislation necessary to continue in force the existing restrictions against Chinese laborers coming to the country, he could not agree, in disregard of our treaties with China, to "provide that these people shall only have the right to remain here upon applying, on certain terms and conditions, for certificates; that if they lose their certificate they are not to be governed by the laws as to other persons; they are here *ticket of leave men;* precisely as under the Australian law a convict is allowed to go at large upon a ticket of leave, these people are to be allowed to go at large and earn their livelihood, but they must have their tickets of leave in their possession." And he said, "this inaugurates in our system of government a new departure; one, I believe, never before practiced, although it was suggested in conference that some such rules had been

adopted in slavery times to secure the peace of society." (*Ibid.*, pp. 4299, 4300.)

The conference report under the parliamentary rules was not the subject of amendment, and had to be concurred in or rejected as a whole by each branch of Congress.

There is no doubt that the general view that the Restriction Act of 1862, as amended by the act of 1884, would expire on May 6, 1892, had much to do in the Senate, at least, with the acceptance of the report of the conference committee, and the registering by the Senate of the decree upon this momentous subject prepared for it by the four managers who signed that report.

Such in brief is the history of the preparation and passage of this act of May 6, 1892, "*to prohibit the coming of Chinese persons into the United States*," a portentous act, an act almost without parallel in the history of the civilization of our times.

ARGUMENT FOR THE APPELLANTS.

FIRST.

The importance of the question presented to the Court by these records, can not well be overstated, for it concerns the fundamental principles of American constitutional liberty, the right to freedom, property, and the pursuit of happiness of many thousands of persons living and laboring long and peaceably under the protection of the Constitution and laws of this land, as well as the friendly international relations between the United States and China, and the welfare of American citizens and American interests in that great Empire.

1. The whole series of treaties between the United States and China are indissolubly bound together, and constitute one treaty with the same effect as if embraced in one instrument. President Hayes, in his message of March 1, 1879, vetoing the anti-Chinese bill, passed by the Forty-fifth Congress, which proposed the express abrogation of Articles V and VI of the Burlingame Treaty, said:

"The Burlingame Treaty recites as the occasion and motive of its negotiation that '*since the conclusion of the treaty between the United States of America and the Ta Tsing Empire of the 18th of June, 1858, circumstances have arisen showing the necessity of additional articles thereto,*' and proceeds to an agreement as to such additional articles. These negotiations, therefore, ending by the signature of the additional articles, July 28, 1868, had for their object the completion of our treaty rights and obligations toward the Government of China by the incorporation of these new articles as, thenceforth, parts of the principal treaty to which they are made supplemental. Upon the settled rules of interpretation, applicable to such supplemental negotiations, the text of the principal treaty and of these *additional*

articles thereto constitute one treaty from the conclusion of the new negotiations, in all parts of equal and concurrent force and obligation between the two Governments, and to all intents and purposes as if embraced in *one* instrument." (Congressional Record, 1879, p. 2275.)

When it is remembered that the immigration treaty of 1880 is, in its preamble, expressly made supplemental to the treaties of 1858 and 1868, and the treaty of 1841 is deemed to have been superseded by the more extensive commercial treaty of 1858, it will be seen that the whole series of our treaties with China *stand or fall together.*

This is the declaration in the note of Mr. Chang Yen Hoon to Mr. Blaine of July 8, 1889, in regard to the effect of the Exclusion Act of October 1, 1888, upon the treaty relations between the Governments of China and the United States. (Foreign Relations, 1889, p. 132.)

The Chinese minister, in that note, cites the weighty words of the chairman of the Committee on Foreign Relations, in discussing the bill of 1888 in the Senate, as follows:

"The Chinese Government might at once, with great propriety, and according to the system of civilized nations, upon our refusing to observe existing treaties, declare that all the treaties are null and void. There is no question about that." (Cong. Rec., vol. 19, p. 8451.)

The accomplished minister, at the same time, observed that he was sure that the Secretary of State would not understand what he had said in his communication to imply a threat on his part, and added: "China has in her intercourse with your Government given too many proofs of her pacific and friendly dis-

position to justify such an inference. But I think you will not fail to see that some positive and decided action on the part of the Executive head of this nation is called for in order to rehabilitate the treaties, and to continue on the same free and friendly footing the commercial intercourse of the two peoples."

2. The United States, by the treaty of July 3, 1841, known as the Treaty of Wang Hiya, obtained from the Chinese Government all it then asked on behalf and in the interest of its commerce and its citizens, including the absolute exemption of Americans in China from the jurisdiction of the Empire. (Mr. Cushing to Mr. Calhoun, September 29, 1844; 7 Ops. Attys. Genl., 497.) This extraordinary privilege by which the laws of the Union follow its citizens, and its banner protects them, within the domain of the Chinese Empire, has ever since been enjoyed by our merchants and our missionaries in China. If this concession were once withdrawn it never would be restored by China.

The treaties made by China in 1858 with the United States, England, France, and Russia, were the beginning of that new life of China, which is yet in its infancy.

The existing Treaty of Amity, Peace, and Commerce of June 18, 1858, known as the Treaty of Tien-Tsin, establishes a careful and comprehensive system for the commercial relations of our people with China, and by the concluding article we receive the most important guarantee "that should at any time the Ta Tsing Empire grant to any nation, or the merchants or citizens of any nation, any right, privilege, or favor connected either with navigation, commerce, political or other intercourse, which is not conferred by this treaty, such right, privilege, and favor shall at once freely inure to

the benefit of the United States, its public officers, merchants, and citizens."

Against this body of stipulations in our favor, and this permanent engagement of equality in respect of all future concessions to foreign nations, the general promise of permanent peace and good offices, on our part, in Article I of the treaty, seems to be the only equivalent.

Under the guarantees in Article XXIX of that treaty, and those of the 4th article of the Burlingame treaty of 1868, upon the subject of religious toleration, no less than fourteen American protestant missions were established in China prior to December, 1887, besides the missions of the Roman Catholic Church, whose missionaries exceed those of any other christian denomination. The diplomatic correspondence, published by the Department of State, shows that, though when our treaties with China were made, permission was only given for residence and ownership of real estate in the treaty ports, that permission has gradually been extended to the interior; that to-day the whole Empire is in fact open to the American missionaries; and that they enjoy absolute and unqualified exterritoriality in all matters involving violation of Chinese law. (See Foreign Relations, 1888, vol. 1, pp. 257, 239.)

The treaty "*concerning Trade, Consuls, Religious Toleration and Emigration*," known as the Burlingame Treaty, was concluded on July 28, 1868, but it was not ratified by the Chinese Government, at Pekin, until November 23, 1869.

The delay of that Government in ratifying the treaty caused the Government at Washington much anxiety, and extraordinary efforts were made by it to prevent the Ministry at Pekin from reversing the action of Mr. Burlingame and his associates in the mission to the

United States and the European nations. (Mr. Fish to Mr. Bancroft, Aug. 31, 1869. Foreign Relations, 1870, p. 304.)

One great object of the United States, in the negotiations of 1868, was to secure the co-operation of the Chinese Government in suppressing the Coolie traffic, which was accomplished by the solemn and unqualified engagement on the part of that Government, in Article V of the treaty, "*to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country without their free and voluntary consent*," and by the stipulation, in that article, which secured the acceptance by China of the American doctrine of free migration to and fro among the peoples and races of the earth.

It was in connection with and as supplementary to these stipulations for the suppression of forced and servile importation of Chinese laborers in the guise of immigration, that the United States promised to extend adequate protection, under the solemn and definitive guaranties of Article VI of the treaty, to the Chinese subjects already residing in the country, and those who should thereafter voluntarily seek our shores.

The bill against Chinese immigration which passed the two Houses of Congress in 1879, and proposed to direct the President to give notice to China of the abrogation of Articles V and VI of the Burlingame Treaty, was vetoed by the President upon the ground that the measure contemplated such a revocation of that treaty as would liberate China from her obligations to the United States, as well under that treaty as under the fundamental treaty of amity and commerce of 1858, and expose our citizens and our commercial and religious interests in that Empire to the consequences of an entire withdrawal of their treaty protection.

"This ancient Government," said the President, "ruling a polite and sensitive people, distinguished by a high sense of national pride, may properly desire an adjustment of their relations with us, which would in all things conform to, and in no degree endanger, the permanent peace and amity, and the growing commerce and prosperity, which it has been the object and the effect of our existing treaties to cherish and perpetuate."

As China, by the treaty of 1868, had engaged to co-operate in measures for our protection against the Coolie traffic, so, by the supplementary treaty of November 17, 1880, after the veto of the bill of 1879, she reconsidered with us the new phases of the immigration question, and acquiesced in the proposal of this Government for such a modification of the treaty of 1868 as would enable it to restrict the future coming of Chinese laborers to our shores.

The intimate knowledge of our diplomacy possessed by Mr. Evarts, under whose auspices, as Secretary of State, the treaty of 1880 was negotiated, enabled him to say, in the Senate, when the Exclusion Bill of 1888 was under debate, that "there had not been an approach that this Government has made to China, in our domestic interests, in the questions of our polity, the questions of our naturalization, and the questions of immigration, that the great nation confronting us has not met us in the most conciliatory and the most yielding attitude." (Congressional Record, vol. 19, p. 8453.)

3. The first bill which passed the Houses of Congress, under the treaty of November 17, 1880, proposed to suspend the immigration of Chinese laborers for a period of twenty years, and to establish a system of *personal registration* of those persons at the custom houses.

The measure was vetoed by President Arthur upon the ground that such a suspension amounted to prohibition in violation of the treaty, and that the system of personal registration, contemplated by the bill, contravened the most favored nation clauses of the treaties with China, and was, also, hostile to the spirit of our republican institutions. (Congressional Record, 47th Cong., 1st sess., vol. 13, p. 2551.)

Congress in the Restriction Acts of 1882 and 1884 no doubt strained the treaty of 1880 to its utmost tension.

The Exclusion Act of October, 1888, as this Court has said, is in direct contravention of express stipulations of the treaty of 1868 and of the supplemental treaty of 1880. (The Chinese Exclusion Case, 130 U. S., 600.)

The views of the Government of China as to the effect of the legislation of 1888 upon the international relations and treaty obligations of the two countries, are ably and temperately presented in the notes addressed to the Secretary of State by Mr. Chan Yen Hoon, in 1889, and Mr. Tsui, the present Minister of China, in 1890, which are published in our Foreign Relations (1889, p. 132, 139; 1890, p. 211, 219.)

There can be no just doubt that upon well settled principles of public laws the legislation of 1888 might well be treated by the Government of China as an invitation to terminate all diplomatic and commercial relations, and exposes the United States to the complete abrogation of its treaties of amity and commerce with the Chinese Empire.

Mr. Tsui in his note to Mr. Blaine of March 26, 1890, said :

"The public law of all nations recognizes the right of China to resort to retaliation for these violated treaty guaranties, and such a course applied to the American missionaries and merchants has been recommended to

the Imperial Government by many of its statesmen; but its long maintained friendship for the United States, and its desire to observe a more humane and elevated standard of intercourse with the nations of the world, point to a better method of adjustment. Conscious that it has religiously kept faith with all its treaty pledges towards your country, my Government is persuaded that America will not be blind to its own obligations nor deaf to the appeals made to it on behalf of the Chinese subjects who have been so grievously injured in their treaty rights by the legislation of Congress. (Foreign Relations, 1890, p. 217.)

4. The act of May 5, 1892, has been the subject of grave protest and remonstrance by the Government at Pekin and its Minister in Washington (the Tsung-li Yamen to Mr. Denby, August 5, 1892; Mr. Tsui to Mr. Foster, Nov. 7, 1892, Sen. Ex. Doc., 52d Cong., 2d session, pp. 27, 31.)

By the treaties Chinese laborers lawfully residing in the United States are guaranteed all the rights, privileges, immunities, and exemptions accorded to the subjects of the most favored nation.

The present enactment, in any view that can be taken of it, subjects the Chinese sought to be affected by it to conditions, penalties, and restrictions which are not imposed by the United States upon the subjects of any other country with which it has treaty relations.

SECOND.

The sixth section of the act of May 5, 1892, was designed to apply to Chinese laborers residing and entitled to remain here under the treaties with China and the laws in execution of them, and has no application to any other Chinese laborers in the United States.

1. Before referring to the particular provisions of the act of 1892, it will be suitable to mention the state of

the pertinent public and statutory law of the United States in reference to the Chinese at the time of the passage of that act.

(*a*) The month of July, 1868, is memorable in the political history of the country.

It was on July 27, 1868, that Congress passed its famous joint resolution which declared that "the right of expatriation is a natural and inherent right of *all people*, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness," and that any declaration or decision to the contrary "is inconsistent with *the fundamental principles of the republic.*" (Rev. Stats., section 1999.)

On the 28th of July, 1868, the Fourteenth Amendment became a part of the Constitution; and on that day Mr. Seward, with Mr. Bulingame, and his Chinese colleagues, signed the celebrated treaty which recognized as a part of the positive international law between the United States and China the doctrine of the inalienable right of man to change his home and allegiance as indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.

The policy inaugurated by the treaty was essentially an American policy, and it was believed that the adhesion of China to those liberal principles of freedom in emigration with which we were so familiar would tend to open up that great Empire to our civilization and our religion, and enable the United States, finally, to control the Asiatic question, which the genius of Mr. Seward even then foresaw as the "*coming question.*"

The fifth and sixth articles of the treaty of July 28, 1868, are as follows:

"ARTICLE V. The United States of America and the Emperor of China cordially recognize the inherent and

inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or any other foreign country without their free and voluntary consent respectively.

"ARTICLE VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." (16 Stats., p. 740.)

(*b*) The negotiations at Pekin, in 1880, were conducted upon the basis of the memorandum laid before the Chinese Commissioners Plenipotentiary, by the representatives of the United States, which declared "that so far as those Chinese laborers are concerned, who, under treaty guarantees, have come to the United States, the government recognizes but *one duty*, and that is to maintain them in the exercise of their treaty privileges against any opposition, whether it takes the shape of popular violence or legislative enactment." (Foreign Rels., 1881, p. 173.)

The preamble and four articles of the immigration treaty concluded November 17, 1880, are as follows:

"Whereas, in the eighth year of Hsien Feng, Anno Domini 1858, a treaty of peace and friendship was concluded between the United States and China, and to which were added, in the seventh year of Tung Chih, Anno Domini 1868, certain supplementary articles to the advantage of both parties, which supplementary articles were to be perpetually observed and obeyed; and—

"Whereas, the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit;—

"ARTICLE I. Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"ARTICLE II. *Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are ac-*

corded to the citizens and subjects of the most favored nation.

"ARTICLE III. *If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.*

"ARTICLE IV. The high contracting Powers having agreed upon the foregoing articles, whenever the Government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the Government of China. If the measures as enacted are found to work hardship upon the subjects of China, the Chinese Minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States Minister at Pekin and consider the subject with him, to the end that mutual and unqualified benefit may result."

(*c*) The Restriction Act of May 6, 1882, entitled "*An act to execute certain treaty stipulations relating to the Chinese*" (22 Stats., 58), as originally framed, and as amended by the act of July 5, 1884 (23 Stats., 115), is printed in the margin of the opinion of the court in the case of Chew Heong *v.* United States (112 U. S., 543), and also with the opinion delivered by Mr. Justice Blatchford in the case of United States *v.* Jung Ah Lung (124 U. S., 627).

The act of May 6, 1882, suspended the coming of Chinese laborers to the United States from and after ninety days from the passage of the act, and for the period of ten years from its date, and made it unlawful

for such laborers to come, or having so come after the expiration of said ninety days, to remain here; but it was expressly provided that the suspension should not apply to the laborers who were in the United States on the 17th of November, 1880, or who should come here within ninety days after the passage of the act. The only requirement in regard to the latter was that when they left the United States after the passage of the act, they should be identified upon their return to the country by the certificates authorized to be issued to them by the collectors at the ports of their departure, "*in order to furnish them with the proper evidence of their right to go from and come to the United States as provided by said act (of 1882) and the treaty between the United States and China, dated November 17, 1880*" (act July 5, 1884, sec. 4).

The Restriction Acts did not abridge, impair, or affect in any manner the fundamental rights, under the Constitution and laws of the United States, of the Chinese laborers in the United States before the suspension of immigration took effect, as guaranteed and secured to them by the treaties of 1868 and 1880.

According to the provision in section 12 of the act of 1884, a Chinese person found unlawfully in the United States could not be removed therefrom without being brought before a Justice, Judge, or Commissioner of a Court of the United States, and judicially found to be a person not lawfully entitled to be or remain here (U. S. *v.* Jung Ah Lung, 124 U. S., 632).

(*d*) In expectation of the final ratification of the treaty of March 16, 1888, Congress passed an act approved September 13, 1888, chapter 1015, entitled "*An act to prohibit the coming of Chinese laborers to the United States*" (25 Stats., 476).

The 13th section of the act is as follows:

"That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers."

(*e*) On October 1, 1888, the Exclusion Act became a law, by which Chinese laborers "who shall have departed (from the United States), or shall depart therefrom, and shall not have returned before the passage of this act," were prohibited from returning to, or remaining in, the United States (25 Stats., 504).

2. This brief review of the public and statutory law pertinent to the subject brings us to the act of May 5,

1892, "*to prohibit the coming of Chinese persons into the United States*," the legislative history of which has been stated.

The manner in which this extraordinary act was produced, as well as the terms of its several sections, show that it is composed of two distinct classes of provisions which have regard, respectively, to two different classes of persons to be affected by it, and that the sixth section relates exclusively to the Chinese laborers residing here on May 6, 1892, "*and who are entitled to remain in the United States*," under the treaties and laws applicable to the Chinese, whereas the first five sections relate to Chinese persons and persons of Chinese descent in the United States in violation of the acts of 1884 and 1888.

A brief analysis of the several sections of the act will show at once this diversity in its provisions, which is accounted for by the manner of its preparation in the conference committee room.

Section 1 simply continues in force for ten years "all laws now in force prohibiting and regulating the coming of Chinese persons or persons of Chinese descent," that is to say the Amendatory Restriction Act of 1884 and the Exclusion Act of 1888.

Section 2 provides that when any such person is *convicted and adjudged by a justice, judge or commissioner before whom he is tried, under any of those laws, to be not lawfully entitled to be or remain in the United States*, he shall be removed to China, unless he shows that he is a citizen of some other country.

Section 3 declares that any such person, when arrested under the act or the acts by it extended, shall be adjudged to be unlawfully here unless he shows affirma-

tively to the satisfaction of the *justice, judge or commissioner before whom he is tried* his lawful right to remain in the United States.

Section 4 provides that any such person convicted and adjudged (by a justice, judge or commissioner) *to be not lawfully entitled to be here shall be imprisoned at hard labor for a period not exceeding a year, and thereafter removed from the United States.*

Section 5 declares that on application for a *habeas corpus* by a Chinese person seeking to land, who has no right to land, no bail shall be allowed.

The foregoing sections constitute in effect one statute relating to the same general subject-matter, viz.: the Chinese unlawfully in the country under the restrictive legislation of Congress, and the proceedings for their punishment and removal by the action of a justice, judge or commissioner.

The other four sections, the sixth, seventh, eighth, and ninth sections, are in effect another statute, superimposed on the original sections, intended to affect only the *Chinese laborers in the United States at the date of the act, and who are by law entitled to be and remain in the United States.*

The sixth section of the act of 1892 purports to make it the "duty" of the Chinese laborers in the country at the date of the act, "*and who are entitled to remain in the United States,*" to apply to the Internal Revenue Collectors of *their respective districts*, within one year after the passage of the act, for what are called *certificates of residence*, and to subject to arrest, without warrant or other process, and to exportation from their homes, by order of any United States judge, without trial or the pretense of a judicial proceeding, any

such Chinese laborer who "*shall neglect, fail or refuse to comply with the provisions of this act,*" that is to say shall "*neglect, fail or refuse*" to *apply to the Collector of Internal Revenue for a certificate of residence*, or who, after one year from the passage of the act, "*shall be found within the jurisdiction of the United States without such certificate of residence,*" unless the man under arrest for exportation shows to the satisfaction of the judge that he was prevented by some unavoidable cause, such as accident or sickness, from making such application for a certificate of residence, and by "at least one credible white witness" that he was a resident of the United States at the time of the passage of the act, and also that he is so entitled to a certificate, or that he had procured a certificate of residence from an Internal Revenue Collector, which has been lost or destroyed.

The section further provides that "any Chinese person *other* than a Chinese laborer, having *a right to be and remain in the United States*, desiring such certificate as evidence of such right may apply for and receive the same without charge."

Section 7 requires the Secretary of the Treasury to make rules and regulations and provide the blanks to enable collectors "to issue the certificates required hereby." The certificates are to contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate is to be filed in the office of the Collector for the District within which such Chinaman makes application.

3. There can be no question, therefore, that the class of Chinese persons intended to be affected by the 6th section of the act of 1892, and the *only* class to whom

it was designed to apply, are the Chinese laborers living in the country who long ago acquired a lawful residence in it under the public treaties with their government and the restriction acts, and who by those treaties and that legislation of Congress are, in the words of the act, "*entitled to remain in the United States.*"

The enactment applies and relates to no other class of Chinese in the country, and it is with reference to them, and their rights of personal liberty and security of property under the Constitution of the United States, that the validity of the enactment is to be considered and determined.

Many of the persons embraced by the act are permanent residents, domiciled inhabitants, of the States in which they live, without any intention to return to China, and are thus in the view of public international law, citizens *de facto*, though not *de jure*, of the United States, and the States in which they have established their homes, and pursue their harmless and useful industries.

Sir Robert Phillimore says:

"There is a class of persons which can not be, strictly speaking, included in either of these denominations of *naturalized* or *native* citizens, namely, the class of those who have ceased to reside in their native country, and have taken up a permanent abode in another. These are domiciled inhabitants; they have not put on a new citizenship through some formal mode enjoined by the law of the new country. They are *de facto*, though not *de jure*, citizens of the country of their domicil." (1 Phillimore, International Law, Chap. XVIII, p. 347.)

Upon this doctrine rests the great argument of Secretary Marcy in the *Koszta* case. "This right," said Mr. Marcy, "to protect persons having a domicil, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be pro-

tected is earned by considerations which the protecting power is not at liberty to disregard. Such *domiciled citizen* pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws; his property is in the same way and to the same extent as theirs liable to contribute to the support of the Government. In nearly all respects his and their condition as to the duties and burdens of Government are undistinguishable." (2 Wharton, Int. Law Digest, § 198.)

This Court, speaking by the Chief Justice, in Lau Ow Bew *v.* U. S. (144 U. S., 60), said:

"By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of the country, and no restriction on the footing upon which such persons stand by reason of their domicil, is to be presumed."

It is possible and probable that some of the resident Chinese laborers, embraced by the sixth section of the act of 1892, have become citizens *de jure* of States of the Union, though they are not citizens of the United States, and it is quite certain that many laborers of Chinese descent in the country are *de jure* citizens of the United States; for persons born within the jurisdiction of the United States of Chinese parents residing here, and not engaged in the diplomatic service of China, are citizens of the United States under the Constitution. (*In Re* Look Tin Sin, 21 Federal Rep., 905.)

Over these Chinese laborers in the States of the Union the Fourteenth Amendment of the Constitution extends its broad and benign provisions, affording them

the equal protection of State laws, and complete security against unequal and unjust discriminations in their administration. (Yick Wo *v.* Hopkins, 118 U. S., 369; Ho Ah Kow *v.* Nunan, 18 Am. Law Rec., U. S., 676; S. C., 5 Sawyer, 552; *In Re* Ah Fong, 3 Sawyer, 144; Parrott's Case, 6 Sawyer, 349.)

Congress, to carry out the provisions of the amendment, has declared that "all *persons* within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and no other." (Revised Statutes, § 1977.)

This Court, speaking by Chief Justice Waite, in *Baldwin* v. *Franks* (120 U. S., 683), said:

"That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty (1880) we do not doubt."

It may be also said that it is the duty of the United States to do so.

THIRD.

The Chinese laborers residing in the country, embraced and sought to be affected by the sixth section of the Act of May 5, 1892, are persons in the States and Territories of the Union clothed with all those great natural and fundamental rights to life, liberty and property which belong and appertain to citizens of the United States under the Constitution.

1. By the treaty of 1868 and the supplemental treaty of 1880, constituting the positive international

law between the United States and China, Chinese laborers residing in the United States are entitled to enjoy the same rights, privileges, immunities, and exemptions which are accorded in the United States to the subjects or citizens of the "most favored nation" with whom the Government has treaty relations.

Although a treaty between the United States and a foreign power is primarily a contract or compact between the two nations, it is well settled that its provisions may be of such a nature as to operate by their own efficacy to confer upon the subjects of them the rights and privileges intended to be secured by them without the aid of legislative enactment, under that provision of the Constitution which declares that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the *supreme law of the land.*"

The treaties with China operate by their own force and efficacy to confer upon and secure to Chinese laborers rightfully within the United States the same rights, privileges and immunities which are there enjoyed by the citizens or subjects of the "most favored nation." (Chew Heong *v.* United States, 112 U. S., 536, 540; Head Money Cases, 112 U. S., 598; Baldwin *v.* Franks, 120 U. S., 702; Hauenstein *v.* Lynham, 100 U. S., 483.)

Before the conclusion of the treaties with China the United States had entered into many conventions with other powers by which their subjects or citizens were and are secured perfect liberty to sojourn and reside, without conditions, impositions or restrictions, in all parts of the territory of the Union, and entitled to enjoy the same rights in respect to their property, commerce,

trade, and industry, and to receive the same protection and security for their persons and property as the *native-born inhabitants or other citizens of the United States.* (See, for example, treaty with Austria, 1829, *Treaties and Conventions*, page 23; treaty with Switzerland, 1850, *Ibid.*, page 1073; treaty with Italy, 1871, *Ibid.*, page 581; treaty with Belgium, 1875, *Ibid.*, page 76.)

Such treaties are in affirmance of the general international law, by which aliens admitted into a country are deemed entitled to the same civil rights in respect to persons and property as its native-born citizens, and the sovereign "*engages to protect them as his own subjects, and afford them perfect security as far as depends on him.*" (Vattel, Bk. II, Chap. VIII, Sec. 4.)

There can be no doubt, therefore, that by the operation of the treaties with China the Chinese laborers who were residing and entitled to remain in the country, at the time of the passage of the act of 1892, were clothed with the same rights of personal security, personal liberty, and private property which are possessed and enjoyed by citizens, as the absolute rights of individuals, under the Constitution of the United States.

But by the express terms of the great provisions of the Constitution for the protection of life, liberty, and property, those provisions are not confined to citizens, but are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, or of color, or of nationality. (Yick Wo *v.* Hopkins, 118 U. S., 356, 359; Ho Ah Kow *v.* Nunan, 18 Am. L. Reg., N. S., 676.)

By the effect of the treaties and the organic law of the United States, the Chinese subjects who have the

right to temporarily or permanently reside in our midst are entitled to enjoy all those rights, privileges and immunities constituting the essence of civil liberty which belong to citizens of the State in which they live. They stand under the laws and before the laws everywhere in respect to the fundamental rights to life, liberty, property and the pursuit of happiness, considered as individual possessions, upon the same footing as the citizens of the nation.

2. It was no part of the plan or purpose of Congress by the enactment in this sixth section of the act of 1892 to *abrogate* or *repeal* the treaties with China in respect to the Chinese laborers residing here at the date of the act, and who were entitled by those treaties and the legislation of Congress in execution of the treaties to remain in the United States, or to *expel* or procure or effect the *expulsion* of such Chinese subjects from the country in hostility to the treaties and the general public law of nations.

On the contrary, the enactment assumes as the predicate and basis of the legislation that the Chinese laborers who are lawfully here are *entitled to remain in the country*, and makes provisions in respect to them, and their rights as vested and existing under the treaties and the laws of Congress, which the enactment treats as *unrepealed* and *unrevoked.*

The act expressly refers to and provides for "Chinese laborers within the limits of the United States at the time of the passage of this act, AND WHO ARE ENTITLED TO REMAIN IN THE UNITED STATES," and legislates in regard to them as "persons" who are in legal contemplation *subjects* of the United States lawfully residing in its territorial jurisdiction, and under its care and protection.

Congress, in speaking of those Chinese laborers "who are *entitled to remain* in the United States," explicitly

assumes the continued and continual operation and efficacy of the treaties with China under which the laborers referred to came into the country, and of their right to reside here under those treaties.

The act does not purport to take away any rights of the laborers who came lawfully into the country under the treaties with China and the Restriction Acts, by abrogating or repealing those treaties or those laws, but explicitly assumes that they are rightfully here, intends that they may remain, and proposes to legislate in regard to them as a part of the lawful population of the United States.

No intention can be imputed to Congress, in hostility to the treaties, to expel or procure the expulsion of the class of Chinese laborers to whom the sixth section of this act of 1892 was designed to apply.

3. The sixth section of the act of 1892 bears no resemblance whatever to the Chinese Exclusion Act of 1888, which was considered by this court in the case of *Chae Chan Ping* v. *United States* (130 U. S., 581, 599), and the doctrines adjudged by the court, in that case, do not apply to the present controversy.

The Exclusion Act of 1888, as applied in that case, operated upon an alien *who had left and was out of the country*, and declared that it should be unlawful for him to return to, or remain in, the United States, notwithstanding the treaties with China, and the prior legislation of Congress, under which he had come to and left the country, which, so far as inconsistent with the act of 1888, was expressly repealed by that act.

As to the Chinese laborers against whom the act of 1888 was directed, the act operated to repeal, abrogate, revoke, or set aside the treaties with China, and the persons affected by the act were in effect made *outlaws*

in the country if and when they should attempt to return to it.

After the passage of the act of 1888, no Chinese laborer who had left or should leave the United States, had any rights in respect to his residence in the country which any judicial court could respect, and every such person was subject to be treated as an intruder and an unlawful trespasser—an *outlaw*, in fact—when he sought to return and re-enter the United States.

It was the particular intention, indeed, of the act of 1888, to deprive the Chinese laborers who had left, or should leave the country, of their treaty rights and treaty protection, and thus to repeal and revoke the treaties so far as such persons and their relations to the United States were concerned.

FOURTH.

The slightest inspection of the enactment in this sixth section of the act of 1892 will disclose to the Court that it purports to confer judicial power upon ministerial officers, attempts to strip judicial officers of their judicial powers, and convert them for the purposes of the act into ministerial officers, and is a plain usurpation of judicial power by Congress, in violation of the Constitution of the United States.

1. The class of Chinese laborers embraced by the enactment, and whose rights are affected by it, consists specifically of laborers within the United States, at the date of the act, *and who are entitled to remain in the United States.*

The act purports to make it "*the duty*" of persons belonging to *this* class to "*apply*" to the Internal Revenue Collectors of their "*respective districts*" for "*a certificate of residence.*" There is nothing said in

the sixth section about the right or duty of a collector to *grant* or *issue* any such certificate, but section 7 contemplates the issuing of certificates by the collectors.

The question submitted to a collector upon an application for a certificate of residence necessarily is that of *the right and title of the applicant to reside in the country, under and by virtue of the treaties and laws of the United States, and the ministerial officer is made the judge of both law and fact in the case.*

If a collector upon such an application *refuses* to "*issue*" or *grant* a certificate of residence, or *withholds* one from the applicant, upon any ground of fact or law, or for any reason or cause which may seem to him suitable or satisfactory, what is *the predicament of the man, and what is to become of him, under the act?*

It is clear that the man, then, is "*found without a certificate,*" in the language of the act; and the act declares that he "*shall be deemed and adjudged to be unlawfully within the United States,*" and that he may be arrested by any customs or revenue officer, or any marshal or deputy marshal, and "*taken before a United States Judge,* WHOSE DUTY IT SHALL BE TO ORDER THAT HE BE DEPORTED FROM THE UNITED STATES."

The judge has no jurisdiction or power to grant any *hearing* to the prisoner upon any question of fact or law involving his right to be and remain in the United States, or review the determination and action of the collector in withholding from him a certificate; the decision and action of the collector in denying or withholding a certificate are conclusive and binding as to the subject matter; and the decision of the ministerial officer *must* be carried into effect and executed by the United States Judge by a decree or order for the deportation of the prisoner before him.

The man is thus summarily and finally *deprived of his liberty, and, in effect, his property in the country*, upon the faith of the decision and judgment of a Collector of Internal Revenue that he has no lawful right to be and remain in the country under the treaties and laws of the United States.

The effect of the enactment is to clothe Internal Revenue Collectors with the discretionary power to act conclusively and finally upon the title of the applicants to remain in the United States, and their *right to liberty in the country*, and to provide for the execution of their determinations *against the laborers* by their arrest and exportation from the country under ministerial orders of the judges of the United States Courts.

The refusal of a collector to grant a certificate to an applicant claiming to be entitled to remain here is, in effect, a *judgment* by the collector *against the title of the man to remain here, and against his right to personal liberty in the country, and that judgment of the administrative officer is carried into execution by the judicial officer before whom the man is brought under arrest.*

It is clear upon a careful reading of the section that the words "*or who shall be found within the jurisdiction of the United States without such certificate of residence,*" were inserted to meet and provide for the identical case where an applicant has been *denied* a certificate by the collector.

A man who has been *denied* a certificate is "*without a certificate of residence,*" and if found is "found without a *certificate of residence.*"

If he is so found, *the statute operates upon him at once, and pronounces his doom, without the intervention of any judicial officer or judicial power.*

The collector has *adjudged* that he is *not* a person "*entitled to remain in the United States,*" and *upon*

that judgment he is to be summarily seized and exported from the country

No hearing is granted to him; no court can protect him; the edict of Congress has gone forth; the man must be carried out of the country under that edict.

The proposition is that the enactment is unconstitutional and void in whole and in part; that the power to determine the questions submitted to the collectors could not be confided to them, to the exclusion of the *judicial power* of the United States under the Constitution; that no Chinese laborer of the class designated by the act, could be required to apply to one of these excise officers for a certificate, and submit and subject to the power of such an officer his rights in respect to his residence in the country, under the treaty and municipal law of the United States.

The whole contrivance is a *nullity*, as an unlawful attempt to confer judicial power upon ministerial agencies of the Executive Department of the Government.

No man can be affected injuriously with or by any "*neglect, failure or refusal*," to apply for one of these residence certificates.

2. The sixth section deals next with the laborers who shall "*neglect, fail or refuse*" to apply for certificates of residence, when they are found, as they must be found, if found at all, *without certificates of residence.*

The act declares that every one of these persons shall be *deemed and adjudged to be unlawfully within the United States*, and may be seized and taken before a United States Judge "whose duty it shall be to order that he be deported from the United States as hereinbefore provided, *unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause, he has been unable*

to procure his certificate, (that is to say, unable to 'apply' for a certificate), and to the satisfaction of the court, and by at least one credible white witness that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost."

It will be perceived that it is only where a prisoner who has *omitted* to apply for a certificate can show to the satisfaction of the judge that he was unable by some unavoidable cause, such as sickness or accident, to apply to the collector for a certificate, that the judge has any right or power to inquire upon the testimony of "*one credible white witness*," whether the man was a resident at the time of the passage of the act, and whether he is entitled to a certificate of residence.

No hearing or investigation by the judge upon any question of law or fact affecting the man's right to his liberty, is allowed to a prisoner in any other case, and in every other case of failure or omission to apply for a certificate, the prisoner is to be conclusively deemed to be unlawfully in the United States, and is to be exported from the country without trial, hearing or investigation of any kind.

No judicial intervention or action is interposed, or allowed to be interposed, *between the enactment and its execution.*

The statute creates the offence, and pronounces the legislative decree for the punishment of the offender against the statute, and that punishment is the *immediate and final deprivation of his liberty by deportation from the United States.*

The agency or instrumentality employed for carrying out the decree of Congress, by the infliction of the ordained punishment, is a United States Judge, who is,

in effect, commanded to get down from the bench, take off his robe, and see that the prisoner is exported out of the United States.

3. It is clear that the power which Congress attempted to exercise against persons who neglected, failed, or refused to apply for these residence certificates, is in its very nature essentially judicial and not legislative power.

Congress decreed that all those of the class of persons embraced by the 6th section who neglected, failed, or refused to apply for certificates should be exported, without judicial trial, by the orders of Federal judges, who should have no duty or function to perform in the business except make the required orders of deportation.

The law, by its own *inherent force*, extinguished the right of liberty of its victims, or compelled its extinction, without any legal process or legal proceedings, and by the agency of judicial persons who were constituted the mere instrumentalities to execute the will of the legislature.

4. Where a laborer under arrest as found without a certificate, shows that he was unavoidably prevented from applying for such document, the judge is authorized to ascertain by the testimony of "at least one credible white witness," whether he was a resident of the United States at the time of the passage of the act, "and if upon the hearing it shall appear that he is so entitled to a certificate, one shall be granted upon his paying the cost."

The prescription of the rule of evidence mentioned, deprives the action of the judge of all judicial character, and renders him the mere agent for executing the legislative will in the particular instance.

"Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." (Cooley, Constitutional Limitations, 392.)

FIFTH.

The enactment in question may be held void without reference to any words of express limitation or prohibition in the Constitution, and it is not necessary that the court should be able to find there some specific inhibition which has been disregarded, or some express command which has been disobeyed.

1. That there are implied reservations of individual rights, even in the broadest and most general grant of legislative power, has been widely recognized and repeatedly asserted in judicial decisions.

Judge Cooley states the principle thus:

"It does not follow that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done. If in one department was vested the whole power of the government, it might be essential for the people, in the instrument delegating this complete authority, to make careful and particular exception of all those cases which it was intended to exclude from its cognizance; for without such exception the government might do whatever

the people themselves, when met in their sovereign capacity, would have power to do. But when only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws.

"It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defence; because it is implied in judicial authority that there shall be a hearing before condemnation. *The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments.*" (Constitutional Limitations, pp. 207, 208, 6th edition.)

These doctrines have been recognized by eminent judges, speaking for this court, and by other courts of high authority.

Calder *v.* Bull, 3 Dallas, 386.
Fletcher *v.* Peck, 6 Cranch., 135.
Wilkinson *v.* Leland, 2 Peters, 657.
Loan Association *v.* Topeka, 20 Wall., 655.
Hurtado *v.* California, 110 U. S., 536.
Yick Wo *v.* Hopkins, 118 U. S., 369.
Gaines *v.* Buford, 1 Dana, 481.
Taylor *v.* Bronson, 4 Hill, 140.

Mr. Justice Chase, in *Calder* v. *Bull*, said:

"There are acts which the Federal or State Legislatures can not do without exceeding their authority. There are certain vital principles in our free Republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; *as to authorize manifest injustice by a positive law, or to take away that security for personal liberty or private property for the protection whereof government was established.*"

One of the best and most authoritative declarations of the existence and nature of the rights here asserted is to be found in the opinion of Mr. Justice Miller, in *Loan Association* v. *Topeka* (20 Wall., 655).

The Court of Appeals of Kentucky, speaking by Judge Underwood, in the case of *Gaines* v. *Buford* (1 Dana, 481), said :

"I do not admit that there is any sovereign power, in the literal meaning of these terms, to be found anywhere in our systems of government so long as the governments remain which they (the people) have instituted to establish *justice* and to '*secure the enjoyment of the right of life, liberty, and property, and of pursuing happiness.*' Sovereign power, or, which I take to be the same thing, power without limitation, is nowhere to be found in any branch or department of the Government, either State or National; nor indeed in all of them put together. These numerous limitations and restrictions prove that the idea of *sovereignty in government* was not tolerated by the wise founders of our system. '*Sovereign State*' are cabalistic words not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. The history of man, in all ages, has shown the necessity of the strongest checks upon *power*, whether it be exercised by one man, a few, or many. Our revolution broke up the foundations of sovereignty in government; and our written Constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever."

2. The enactment in question is repugnant to the body and spirit, the very *soul*, of the Constitution, and if there were not one word in the instrument setting bounds to and qualifying the *legislative power* of the Government, the court would find no difficulty in declaring that the legislative power did not extend to the enactment of a statute like the one under consideration.

The legislative power of this Government does not reach to such an extent. The power to pass such a statute, a statute by which rights of personal liberty and of security of property, vested by the public and organic law of the United States, may be devested and destroyed without any exercise of the judicial power of the United States, from its very nature and necessity is "*fore prized*," and taken out of the grant of legislative power without any express exception or limitation, and the act, though in form of law, yet not being within the scope of the authority conferred upon Congress, is not *legislative power*, and so is null and void.

The legislative power of Congress is not supreme in in regard to the subject of this enactment. It is controlled by the limitations indicated by the authorities cited; it is not to be so construed as to imply a surrender by the people of "*those reserved individual rights which grow out of the nature of a free government*," a grant of which cannot be said to "*lurk under any general grant of legislative power;*" and under such interpretation any act of Congress which proposes to provide a proceeding by which a right of personal liberty and of security of property is to be destroyed or devested without any exercise of the judicial power of the United States, cannot be deemed an exercise of legislative power, within the meaning of the Constitution.

SIXTH.

Congress had no power to constitute Internal Revenue Collectors special tribunals to act conclusively and finally upon applications for certificates of residence, involving the rights of personal liberty and security of property of the persons designated by section 6 of the act of 1892, and the determination and action of such ministerial officers upon such applications are not and could not be made "due process of law," under the Constitution, in respect to the subject-matter of those applications and those certificates. The 6th section is, therefore, unconstitutional and void as repugnant to the Fifth Amendment of the Constitution, which declares, "nor shall any person be deprived of life, liberty, or property, without due process of law."

1. This clause of the Fifth Amendment is found in the Fourteenth Amendment, and has been incorporated in substance into all our State Constitutions.

It is universally agreed that "*the law of the land*," or "*due process of law*," do not mean the very act of legislation which deprives a person of his rights, privileges or property, and the Constitution would then mean that no person shall be deprived of his property or rights, unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint away entirely. (Murray's Lessee *v.* Hoboken Company, 18 How., 276; Wynehamer *v.* The People, 13 N. Y., 393.)

This Court, in the first case, said: "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as the executive and judicial powers of the Government, and cannot be

so construed as to leave Congress free to make any process "due process of law" by its mere will."

In the New York case cited, Judge Comstock said:

"The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the Government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—*not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the State.* The cause or occasion for depriving a man of his supposed rights must be found in the law as it is, or, at least, it can not be *created* by a legislative act which aims at their destruction. Where rights are admitted to exist, the Legislature can not say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the Legislature is omnipotent."

2. It is manifest that the subject-matter of the proceedings before Internal Revenue officers upon applications for certificates of residence by the Chinese laborers designated in the sixth section of the act of 1892, is within the cognizance of the judicial power of the United States, and could not be confided to the conclusive and final determination of ministerial officers, to the exclusion of the judicial courts of the United States, and that Congress could not make the decision and action of such officers "*due process of law*" in respect to the rights of personal liberty and security of property of those laborers in the United States.

The questions of law and fact proposed to be submitted and subjected to the decision of the collectors upon the applications, are strictly judicial questions, and the power proposed to be conferred upon them in the matter of the applications, is essentially judicial

power to be exercised by them to the exclusion of the courts of the United States in whom alone judicial power can be vested.

It is true, also, that those applications involve a judicial controversy and, substantially, a judicial controversy to which the United States is a party, which could not be committed to the decision of administrative officers.

The very *issue* presented, involved and adjudicated in the case of every application for a certificate of residence, under the act, is whether or not the resident laborer is entitled to be and remain in the United States, under the existing laws of the country, and the decision of the collector *against* him upon his application is carried into immediate effect by the final deprivation of the personal liberty of the applicant.

The granting or refusing a certificate by the collector directly involves a judicial determination by the officer that the laborer has or has not a right to personal liberty in the country, and is free or not free from liability to seizure and exportation under the act.

In no country in which the great principles of public liberty and private right, which lie at the foundation of all free government, are recognized, can the right of resident aliens to personal liberty under the laws be submitted to the conclusive determination of ministerial officers. The thing is necessarily repugnant to the jurisprudence of every country in which the ideas and processes of civil liberty and civil justice are known and understood.

The provisions of the Constitution which relate to the judicial power of the United States are entirely incompatible with the exercise of any such jurisdiction and authority as are attempted to be conferred upon the

excise officers who are to determine finally and without review the subject matter of these applications for residence certificates as between the laborers and the United States.

There is no doctrine, as we apprehend, in the decisions of this Court, having any relation to this question as to the power of Congress to confer upon the collectors the jurisdiction contemplated by the act of 1892, which is opposed to the view we have submitted to the Court upon that subject.

This learned Court has clearly indicated the principle by which executive and ministerial officers may be competent to decide certain questions of individual right; but such competency has been limited to a determination of the question whether the right in question may be *acquired*, and the same cases in which that competency has been admitted have held that a right once acquired cannot be devested by any power but that of a judicial court acting in a proceeding instituted directly for that purpose.

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) it was adjudged that the decision of an Inspector of Immigration was conclusive as to the facts upon which the right of the immigrant to land depended. The principle there applied was that such a power could be vested in a non-judicial officer to the extent of determining whether a right should be acquired by a foreign immigrant, a person who had never had any residence or domicile within the United States, and had never even been admitted into the country.

3. But whether the power to be exercised by these collectors is judicial or executive in its character, it is a power which can not be vested in and exercised by such agencies of the Government, consistently with the set-

tled maxims of our constitutional law, and it cannot be deemed, therefore, "due process of law" with respect to the individual rights intended to be subjected to it.

A statute which purports to authorize Internal Revenue Collectors to determine finally and conclusively whether persons long domiciled in the States of the Union, and engaged in harmless and useful industrial pursuits, are entitled to live and labor in the country, and to send them away, in the exercise of a discretion uncontrolled by law, can not, it is respectfully submitted, be said to fall within the *domain of law* at all, under what is called a free government, as distinguished from a despotism.

This learned Court, speaking by Mr. Justice Matthews, in the case of *Yick Wo* v. *Hopkins* (118 U. S., 369, 370), said:

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the expression of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the

monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of *slavery* itself."

The same eminent Judge, speaking again for this Court, in the great case of *Hurtado* v. *California* (110 U. S., 535), said:

"Law is something more than mere will exerted as an act of power. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, *is not law*, whether manifested as the decree of a personal monarch or an impersonal multitude. The enforcement of the limitations imposed by our constitutional law upon the action of the Governments, both State and national, by judicial process, is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, *even when acting in the name and wielding the force of the Government.*"

4. This Court has often said that it is at liberty to consider the effect of a statute as the proper test of its constitutionality, and has applied this test in numerous cases adjudged by it arising upon the constitutionality of legislative enactments. (Henderson *v.* Mayor of N. Y., 92 U. S., 259; Chy Lung *v.* Freeman, 92 U. S., 275; Yick Wo *v.* Hopkins, 118 U. S., 372.)

The plain and manifest effect of this 6th section is to place the rights of liberty and property of the lawful Chinese residents of the country under the dominion of the administrative officials who are to carry it into exe-

cution, in a manner which cannot be recognized as conformable to the fundamental principles of a free Republican Government, and which can only be possible under a despotic Government.

The proposition respectfully submitted to the Court is that unless this Government *is* a despotism, Congress could not invest such ministerial officers with the power to determine the questions of *right* in respect to the residence of such persons in the country, and provide for giving effect to their determinations in the manner attempted to be declared by this act.

In the exercise of the power conferred upon the officers, rights which have long vested, may be *devested* without even a hearing before them upon the subject matter involved, and without any color of a proceeding which regards the fundamental principles of liberty and justice.

The form of certificates to be issued to Chinese laborers under the provisions of the act, shows what the act plainly indicates, that the Collectors are to adjudicate the question of lawful right to be and remain in the United States, the question of *lawful status:*

No.——. UNITED STATES OF AMERICA.

Certificate of residence issued to Chinese laborer (or Chinese person other than laborer) under the provisions of the act of May 5, 1892.

This is to certify that —— ——, a Chinese —— now residing at ——, has made application, No. ——, to me for a certificate of residence under the provisions of the act of Congress approved May 5, 1892, and I certify that it appears from the affidavit of witness submitted with said application that said —— —— was within the limits of the United States at the time of the passage of said act, and was then residing at ——, and THAT he WAS AT THAT TIME LAWFULLY ENTITLED TO REMAIN IN THE UNITED STATES, and that the following is a descriptive list of said Chinese ——:

Whether the laborer was "lawfully entitled to remain in the United States," is a judicial question of law and fact, of which the ministerial officer is made the conclusive judge, and which is to be determined according to his discretion.

By the regulations he is the judge of the credibility of all witnesses, who are to appear before the collector or his deputy, and be fully questioned in regard to their testimony before being sworn.

The witnesses are to prove the fact of residence, and "LAWFUL STATUS" within the United States. "*Lawful status*" is a large subject for adjudication by such a tribunal!

The regulations provide:

"If the applicant is unable to furnish such witness *satisfactory to the collector or his deputy*, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application with the proofs presented shall be forwarded to the Commissioner of Internal Revenue for his *decision.*"

It is unnecessary to suggest or comment on the injustice capable of being wrought under cover of such a power as is attempted to be confided to these officers, for that becomes apparent to everyone who gives to the subject a moment's consideration.

We beg to submit again that a statute which clothes such officers with such power over the liberty and property of any people within this free land, hardly falls within the *domain* of *law* at all, and is an exercise meerly of despotic power, and must be inoperative and void.

The act contains the very essence of slavery itself.

SEVENTH.

Inasmuch as the provision of section 6 of the act of 1892, requiring the Chinese laborers entitled to remain here to submit to the decision of the Internal Revenue Collectors the matter of their legal right to remain in the country, under our treaties and laws, is unconstitutional and void, no such laborer can be guilty of any neglect, failure, or refusal to apply for a certificate of residence, under the act, or affected with the penal consequences of such neglect, failure, or refusal, purported to be declared by the act.

1. The all-sufficient and complete answer and defence of these petitioners to the charge of being found without "certificates of residence" in their possession, is this settled doctrine of our constitutional jurisprudence, namely, that "*an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.*"

Norton *v.* Shelby Co., 118 U. S., 442.

The provision of this act, therefore, purporting to make it the "duty" of these laborers to apply for certificates of residence, and submit to the determination of the collectors their right to remain in the United States under the laws of the land is "*as inoperative as though it had never been enacted.*"

It imposed no *duty* on the Chinese laborers sought to be affected by it; it conferred no right upon the Government of the United States, and no authority upon any "*United States customs official, collector of internal revenue or his deputies, United States Marshal or his deputies,*" or upon any "United States Judge;" every

man of them, who should arrest one of these laborers, would be a tort-feasor, a wrong-doer; it affords no protection to anybody, acting under the act; *it is as if it never were*, in the contemplation of the supreme law of the land.

2. The whole enactment in the 6th section of the act of 1892 must fail by reason of the unconstitutionality of the primal and fundamental provision, which seeks to require the Chinese laborers lawfully residing in the country to submit their rights in respect to their residence here, by these applications, to the discretionary power of Internal Revenue Collectors.

It is well settled that where the provisions of a statute are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together that it can not be supposed the Legislature would have passed the one without the other, the unconstitutional part affects the whole enactment with invalidity.

Barron *v.* Burnside, 121 U. S., 197.
Comm. *v.* Hitchings, 5 Gray, 485.
U. S. *v.* Reese, 92 U. S., 214.
Virginia Coupon Cases, 114 U. S., 269.
Baldwin *v.* Franks, 120 U. S., 685.
U. S. *v.* Harris, 106 U. S., 620.

In *Barron* v. *Burnside* (121 U. S., 197), the question was upon State legislation which required foreign corporations to file a copy of their articles of incorporation, but the Court said that the provisions were so coupled with the application for the permit, and with the stipulation referred to, in the act, that it was clear that the real object of the statute, and its substantial provision, was the requirement not to remove the suit into

the Federal court, which was invalid. The whole enactment accordingly fell.

In *Baldwin* v. *Franks* (120 U. S., 685), the Court said: "To give effect to this rule (that a statute may be in part constitutional, and in part unconstitutional) that which is constitutional, and that which is unconstitutional, must be capable of separation, so that each may be read by itself."

In *U. S.* v. *Reese* (92 U. S., 221), the Court said:

"We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. * * * The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is beyond the control of the court; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, *the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the states and the people.*"

It is perfectly clear that this enactment is not separable into parts in such manner as to sustain any portion of it.

If the Constitution did not authorize Congress to erect the Internal Revenue Collectors into tribunals to pass upon the rights involved in applications for certificates under the statute, it could impose no "duty" upon the Chinese laborers to make such applications, and it could not subject them to any penalty for any *neglect, failure, or refusal*, to make such applications.

No man can be punished for failing to do an act which the legislature had no power to direct him to perform; no man can be required to submit his fundamental rights to an unconstitutional tribunal; and no man can be

affected with penal consequences for any neglect or refusal to comply with a legislative requirement which purports to direct him to apply to such a tribunal for the determination of his rights of personal liberty and security of property under the Government of the United States.

EIGHTH.

A Chinese laborer within the designation of section 6 of the act of 1892, who shall "neglect, fail, or refuse" to apply for a certificate of residence, or who shall be found without a certificate of residence can not be deprived of his liberty by arrest and exportation in the manner provided in that act, under the Constitution of the United States. The proceeding for which the act provides, in the case of such a person, is simply in execution of a legislative decree of banishment against the individual, which is in violation of the Constitution. The enactment is not a law, but is a legislative sentence.

1. The substantial provisions of section 6 may be briefly here restated:

(*a*) The Chinese laborers entitled to reside and remain here are to apply to the collectors for certificates of residence, and the officers are to ascertain and determine their lawful right to remain in the country.

(*b*) Any Chinese laborer in the country at the date of the act, and entitled to remain here, who shall fail either negligently or wilfully to make the application, *or* who, after the prescribed time, shall be found here without such certificate, shall be deemed and adjudged to be here unlawfully, and may be arrested.

(*c*) The officer who arrests him shall thereupon take him before a United States Judge.

(*d*) The Judge shall thereupon order him to be deported from the United States, unless such laborer shall excuse his failure to make the required application by showing that it was caused by sickness, accident, or some other equivalent cause. If he establishes such excuse, he may then show his residence at the date of the act, by at least one credible white witness, and that he is entitled to a certificate.

What must be the operation of this act?

It has been already seen that if a collector *refuses* a certificate, the applicant, by such refusal, is placed in the condition of being *found* without one, &c. Then the act declares that persons so found are unlawfully here.

The act thus gives *to the collector's refusal* the conclusive effect of being a determination by the officer that the applicant was unlawfully here, and subject to exportation.

It is to be observed that this determination is *ex parte*, since it is made on an *ex parte* application.

It follows that a person who had been as a matter of fact and law entitled to remain, is to be subject to deportation without a hearing, if the collector should decide against him.

This determination is not to be subject to any judicial examination. Whatever may be the nature of the judge's action, the matters which he is authorized to examine are precisely defined, and this is not one of them.

He is in such cases *obliged* to make the order. *He is simply to carry out the collector's decision.*

2. The case of a laborer who can not show the requisite excuse for his failure to apply for a certificate, and in this way is found without one, presents another aspect. In these cases, of course, there is no determination by the collector. What happens in such cases? The judge must forbear any inquiry into the lawful *right* of the party to remain in the United States, and he is required *at once* to order deportation.

On the question of liability to such order or alleged judgment there is to be no hearing.

The order of deportation, and included loss of liberty, is inflicted as the immediate consequence of being without excuse in not having a certificate.

As there is no hearing upon any question except the question of accident, the Judge merely executes the order of the legislature.

The legislature DECREES that all persons who show no excuse for not applying for a certificate shall be deported, and that the judge shall make the necessary order at once on ascertaining that they offer no excuse.

There is no more hearing in such a proceeding than there would be if the Criminal Court of the District of Columbia were authorized by Congress to inquire whether a property owner had purposely failed to pay his taxes, and was commanded, on receiving an affirmative answer, to enter a fine or inflict inprisonment.

3. There can be no question, as we respectfully submit, that the enactment is an assumption and usurpation by Congress of judicial power, in defiance of the Constitution.

The Constitution, Article I, section 1, declares: "All legislative powers herein granted shall be vested in a Congress of the United States."

Article III, section 1, declares: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

By these articles, in connection with Article II declaring how the executive power shall be vested, the partition and separation of the three powers is complete.

In Merrill *v.* Sherburn (1 N. H., 199), the union of legislative and judicial powers is pronounced to be, in the words of Mr. Madison, "*the very definition of tyranny*," Federalist No. 47; or, as Mr. Jefferson says, "*precisely the definition of a despotic government.*" (Notes on Virginia, 195.)

In Ervine's Appeal (16 Penn., 256) it is said: "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general term, and orders it to be enforced."

In O'Connor *v.* Warner (4 W. & S., 223), Ch. Justice Gibson says: "A legislative direction to perform a judicial function in a particular way would be a direct violation of the Constitution, which assigns to each organ of the Government its exclusive function and a limited sphere of action. No one will assert that a court would be bound by a mandate to decide a principle or a cause a particular way. Such a mandate would be a usurpation of judical power."

To the same effect:

Picquet *v.* Appellant, 5 Pick, 65.
Lewis *v.* Webb, 3 Greenl., 326.
Greenough *v.* Greenough, 11 Pa., 489.
Palairet's Appeal, 67 Pa., 485.
De Chastellux *v.* Fairchild, 15 Pa., 18.
Waters *v.* Stickney, 12 Allen, 1.
Wynehamer *v.* The People, 13 N. Y., 378.

In any view of the enactment in the sixth section of the Act of 1892, it is nothing more or less than a legislative sentence against the persons sought to be affected by it, which is to be executed, if executed at all, without the interposition of any court of justice or the use of any judicial process whatever, by its own inherent efficacy, and is, therefore, a plain usurpation of the judicial power of the United States under the Constitution.

Such a breach of the Constitution was never before attempted by Congress, and has no parallel in the history of the Government.

NINTH.

The enactment in section 6 of the Act of 1892, which purports to authorize and require the arrest and deportation of the Chinese laborers, who shall "neglect, fail, or refuse" to apply for certificates of residence, and who shall be found without such certificates, in the manner and by the proceedings therein directed, is unconstitutional and void, as repugnant to that provision of the Fifth Amendment of the Constitution which declares that no person shall be deprived of life, liberty, or property "without due process of law."

1. The purpose and value of declaratory bills of right are admirably stated by Chancellor Kent in his Commentaries (2 Kent, Comm., § 24). After mentioning that those are certain absolute rights of individuals which may be resolved into the right of personal security; the right of personal liberty; the right to acquire and enjoy property, he says: "These rights have been justly considered and frequently declared by the people of this country, to be natural, inherent, and inalienable," and after stating the arguments which had been originally

made against the necessity in our representative republics of such "declaratory codes," he says: "On the other hand, there is weight due to the consideration that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion; and to render it more quick to detect and more resolute to resist attempts to disturb private rights. It requires more than ordinary hardiness and audacity of character to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early education; which recommended themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a Constitutional sanction. Bills of rights are part of the muniments of freemen, showing their title to protection."

Mr. Jefferson, answering the same objections to the insertion of a bill of rights in the Constitution, said:

"The Executive in our Government is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the *legislatures* is the most formidable dread at present, and will be for many years. That of the Executive will come in its turn; but it will be at a remote period." (Letter to Mr. Madison, March 15, 1789, 3 Jefferson's Works, p. 4.)

The exposition given by this Court to the words "due process of law," in the Fifth Amendment, declares that they were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta, which declared:

"No freeman shall be taken (arrested) or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or the law of

the land." (Murray's Lessee *v.* Hoboken Company, 18 How., 278.)

No definition of the words "the law of the land" has been more frequently approved than that given by Mr. Webster in the Dartmouth College case:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." (Works of Webster, Vol. V, p. 487.)

This Court, speaking by Mr. Justice Mathews, in Hurtado *v.* California (110 U. S., 527), said that "the principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson in Bank of Columbia *v.* Okely" (4 Wheat., 235), as follows:

"That the words were intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private right and distributive justice."

"The law of the land," as thus interpreted, never did, in England, and does not, in this country, admit of any penal infliction without and not warranted by a *judicial sentence;* and "due process of law," in cases involving penal infliction, necessarily implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to the settled course of judicial proceedings in such cases. (Caldwell *v.* Texas, 137 U. S., 692; Greene *v.* Briggs, 1 Curtis, 311; Taylor *v.* Porter, 4 Hill, 140; Westervelt *v.* Gregg, 12 N. Y., 202; Wynehamer *v.* The People, 13 N. Y., 378, 433; Doram *v.* Commonwealth, 1 Dana, 331; Hoke *v.* Henderson, 4 Div. N. C., 1; 3 Story Constitution, § 1783.)

Mr. Justice Curtis, in Greene *v.* Briggs (1 Curtis, R. 311), speaking of these words in the Constitution of

Rhode Island, says: "The exposition of the words as they stand in *Magna Charta*, as well as in the American Constitutions, has been, that they required 'due process of law,' and in this is necessarily implied and included the right to answer and contest the charge, and the consequent right to be discharged from it unless it is proved."

He subsequently added:

"It follows that a law which should preclude the accused from answering to and contesting the charge, unless he should first give security in the sum of $200, to pay fines and costs, and which should condemn him to fine and forfeiture, unheard, if he failed to comply with this requisition, would deprive him of his liberty or property, not by the law of the land, but by an arbitrary and unconstitutional exercise of the legislative power."

In Wynehamer *v.* The People (13 N. Y., 378) provisions in an act prohibiting the sale of spirituous liquors, enacting that a defendant on trial under the act should not justify under a certain section except on certain conditions as to admitting the sale and making oath to his belief, were held void as against the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law."

It was adjudged that the right to appear, answer, and defend is included in due process of law, and that the right cannot be clogged with onerous conditions and restrictions.

2. The Government is estopped to deny that the acts omitted and committed, which are sought to be dealt with and affected by the enactment, are not crimes or offences against the United States, and that the penalty of exportation annexed to those acts, is not to be deemed punishment imposed for them, in the meaning of our jurisprudence.

The persons to whom the enactment applies, are the Chinese laborers lawfully residing in the country, at the date of the passage of the act.

It applies, therefore, to persons who constitute a part of the population of the United States, and who are recognized by the act itself, as persons subject to the general municipal jurisdiction and criminal legislation of the United States.

It is made "*the duty*" of such persons to apply to the designated collectors for certificates of residence, and the act gives them one year within which to perform it, with the declaration that those who "neglect, fail, or refuse" to perform that duty, within the time prescribed, and those who after that time are found without such certificates, within the jurisdiction of the United States, shall be subject to be deprived of their liberty by arrest and deportation from the United States.

Deprivation of liberty is thus imposed upon those who violate the duty sought to be enjoined of applying for certificates of residence, as required by the act, and upon those who commit the act of being in the jurisdiction of the United States without the prescribed certificates after the year limited for the applications.

It has been before shown that the words, "*or* who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence," were intended to provide for the cases of those persons to whom certificates had been refused, or from whom they had been withheld, by Internal Revenue Collectors.

Unless the words refer to that class of persons, they are plainly superfluous.

It was intended to make it an offence for a Chinese laborer, from whom a certificate had been withheld by

a Collector, to be in the United States, and to punish him accordingly.

It was no doubt the specific intention of the framers of this enactment to inflict the punishment of deportation upon those who violated the duty sought to be enjoined by the law, as the means of coercing compliance with that duty.

The acts of omission and commission, intended to be affected by the statute, are technically crimes or misdemeanors, and the penalty denounced against them, is technically punishment imposed for those acts.

Blackstone defines "a crime or misdemeanor" to be "an act committed or omitted in violation of a public law, either forbidding or commanding it." (4 Bl. Comm., 5.)

"Punishment," says Mr. Wharton in his Law Dictionary, "is the penalty for transgressing the laws;" and this definition was said by Mr. Justice Miller in *ex parte* Garland (4 Wall., 393) to be "as comprehensive and at the same time as accurate a definition as can be given."

One of the punishments prescribed by penal codes is banishment. "Some punishments," says Blackstone, "consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment" (4 Bl. Comm., 377). Chancellor Kent says: "Exportation for crimes rests entirely, in England, upon statute, for it was a punishment unknown to the common law. A statute under Elizabeth first inflicted banishment for offences. Some of our American Constitutions have declared, that no person shall be liable to be transported out of the State for any offence committed within it. (Constitutions of Vermont, Ohio, Illinois, and Mississippi). Convicts have sometimes been pardoned under the con-

dition of leaving a State in a given time, and not returning. This was equivalent, in its effect, to a judicial sentence of exportation or banishment." (1 Kent Commentaries, 651.)

This punishment of banishment, by exportation, sought to be inflicted upon those who offend against the enactment, must thus be deemed to be cruel and unusual punishment, within the prohibition of the Constitution.

3. The punishment by deprivation of liberty thus intended to be inflicted upon those who violate the act, is not imposed by a Judge in the exercise of judicial power by means of a judicial judgment after trial or hearing, according to "the law of the land."

The act does not purport to confer upon the United States Judges a judicial function, in the sense of the Constitution, to be exercised by them in the ordinary forms of a court of justice.

In the first place, the Act contemplates that orders of deportation may be made when the Judge is not holding a court. The statute clearly contemplates that the proceedings shall be without delay. It can not be supposed to authorize a detention of such prisoners during a vacation and until a regular term shall occur. Indeed, the language of the act imports that the taking of the laborer before a United States Judge is to follow forthwith upon his arrest, and that the Judge is to proceed with the matter, whether during term or vacation. It follows that the order depriving the laborer of his liberty is not made by a court of justice, but in the exercise of such power as a judge may have when he is not holding a court.

In the next place, the order of deportation is to be made without the exercise of judicial function in the ordinary forms of a court of justice.

Deprivation of liberty, as the consequence of any fact, can only be wrought by the exercise of judicial power, by means of judicial judgment after trial.

This statute actually forbids a trial in the sense of the Constitution, and requires that the punishment, by deprivation of liberty, shall be inflicted upon the laborer, as the consequence of a fact, without such trial of the fact by a court and jury.

There is no pretence, therefore, of giving to the United States Judges judicial power, or that they exercise such power in these cases, in the sense of the Constitution.

The test applied by this court in the case of United States *v.* Ferreira (13 How., 40, 46), is applicable here. In that case, Mr. Chief-Justice Taney, speaking for the Court, said: "It is manifest that this power to decide upon the validity of these claims, is not conferred on them (the Judges) as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is no suit; no parties in the legal acceptance of the term, are to be made; no process to issue, &c. It is too evident for argument that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one."

4. It is manifest, therefore, that there is no color of any provision in the Act for depriving these persons of their liberty according to the mode of proceeding applicable to cases of imputed crime and penal infliction, and it thus plainly operates as a deprivation of liberty without "due process of law," in violation of the Constitution.

TENTH.

Congress could not invest the Judges of the United States Courts with the power purported to be conferred upon them by Section 6 of the Act of 1892, and any order of deportation which should be made under the pretended authority of that enactment, would be illegal and void under the Constitution of the United States.

1. The Constitution, Article III, Section 1, declares: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

By Section 2, Article III, it is provided, that "the judicial power shall extend to all *cases* in law and equity, arising under this Constitution, the laws of the United States, and treaties made under their authority; * * * to controversies to which the United States shall be a party," &c.

The word "cases" was defined in *Ex parte* Milligan (4 Wall., 112, 113) to be proceedings by which parties pursue the remedies which the law affords them in courts of justice.

No "case" is instituted in a court of justice by the presentation of an arrested laborer to a United States Judge for deportation under this Act.

There is no suit: no parties in the legal acceptance of the term are to be made; no process to issue (U. S. *v.* Ferreira, 13 How., 46).

The proceeding is altogether *ex parte*, and all the Judge can do is to identify the prisoner as one included in the Act, and order his exportation without the exercise of any judicial function of decision upon his rights, and thus execute the will of Congress as declared by the statute.

If the proceeding were in a court of justice, before a judge holding such court, it would be not only the right but the duty of the Judge to pass upon the question of the constitutionality of the act under which the prisoner was arrested and brought before him, and if he held the act to be invalid, to discharge the man; but no such question can be adjudicated by a United States Judge, acting as such under this enactment.

After the prisoner has been identified as a Chinese laborer who has been guilty of the dereliction of duty, mentioned in the act, or who has been refused a certificate of residence by a collector, the Judge is to exercise the ministerial power of signing an order for the exportation of the prisoner, simply as the agent and instrument employed by Congress to carry out the enactment.

There is no "case;" no decision upon rights; and as we have said, the Judge is to act without reference to any term of court.

The terms of United States Courts have always been fixed by statute, and there is nothing in the act to authorize the judge to establish by his order a new and special term whenever a Chinaman is brought before him. Without such special term so appointed there might therefore be no court at the time of an application for the order.

The statute can be construed to mean no more than that the power of deportation was intended to be conferred upon the United States Judges personally by that description, without reference to the Courts of which they are members, and scarcely even as Commissioners, for a Commissioner is an officer who usually exercises *quasi* judicial functions, judgment and discretion, in the matters submitted to him by law.

2. It is too plain for argument that it was not in the power of Congress to require or authorize the United

States Judges personally to exercise the power in respect to the personal liberty of any class of men, attempted to be conferred by this Act, and that no Judge would have a right to accept such a power at the hands of Congress, even if Congress could require him to act as a special Commissioner in a matter which did not involve deprivation of life, liberty or property.

The character and dignity of the Judges of the country can not be interposed by such a law to save it from the consequences of the exposure of its true character.

It loses none of its infamy by the attempted association of the Judges of the United States with it and its execution.

3. If the 6th section of the Act of 1892, instead of attempting to vest in the Judges of the United States the power of deportation therein described, had expressly provided that the same powers should only be exercised in term and by the *Courts* in their judicial capacity, it would have been equally a nullity.

The effect of such a provision would still have been that the prisoner was to be deported and thus finally deprived of his liberty in the country, on account of some act or omission, in violation of a law, real or supposed, and without the trial and judicial sentence required by the Constitution.

It is plain, as has been shown, that this section provides a penal consequence and a penal infliction, and that the restrictions of the 5th amendment must apply.

Congress could not invest any court of the United States with the power to export these men without a judicial trial and a judicial judgment, according to the grant of judicial power in the Constitution.

In a note which Mr. Chief Justice Taney was authorized by this Court to append to the case of United States *v.* Ferreria (103 How., 40), it appears that the Court

laid down the principle that Congress could not vest in the Courts of the United States any power that is not judicial power within the meaning of the Constitution. (Hayburn's Case and United States *v.* Todd.) The principle enforced was that the Legislature could not alter the constitutional limitations of the judicial power of the United States; a principle so obvious as hardly to need the support of authority.

A *fortiori* that what the Courts could not be authorized to do in their acknowledged judicial capacity, can not be done by Judges acting ex-officio. The latter can not be invested with more than the judicial power of the Constitution.

When the Constitution has made the deprivation of human life, liberty, and property a matter of judical power, and provided the limitations of that power, the Legislature has nothing that it can give in respect to those subjects but that judicial power with those limitations.

4. In the case of *U. S.* v. *Ferreira* (13 How.), this Court adjudged that the power conferred on the District Judge of Florida, by the Act of 1849, was imposed personally on the Judge, and Chief-Justice Taney said, "it appears from the note to the case of Hayburn, that a majority of the Judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the Judges, they would have held that it was given to them personally by that description, and would have performed the duty as Commissioners, subject to the revision and control of the Secretary and Congress, as provided in the law. The opinions of all the Judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial under the grant of the Constitution, and could not be exercised as such."

The power conferred on the Circuit Courts under the Act of 1792 was simply a power to place persons on the pension list, and the power conferred on the Florida District Judge, by the Act of 1849, was to adjust claims against the United States under the Florida Treaty, which the Court said might be constitutionally exercised by the Judges personally as Commissioners.

But there can be no question that Congress can not authorize the Judges of our Courts personally or as Commissioners to entertain proceedings involving the final deprivation of the life, liberty, or property of persons under the jurisdiction of the United States.

Such proceedings are judicial, in the sense in which judicial power is granted by the Constitution to the Courts of the United States.

Congress cannot employ the National Judges to execute its sentences, without the interposition of the judicial power of the Government between it and the intended subjects of its legislation, merely as convenient instruments for that purpose. This thing Congress can not do under the Constitution. Happily, the Constitution saves the American Judiciary from "the body of that death."

ELEVENTH.

The 6th section of the Act of 1892 will operate to deprive persons against whom it may be enforced of their property in the United States without "due process of law," and is for that reason also unconstitutional and void.

1. The effect of the operation of this enactment, if enforced according to it terms, would be to separate instantly the persons subjected to its provisions from their property in the United States, and deprive them of all such control, care, and management of it as are neces-

sary for its safety and preservation. The act, in effect, destroys or impairs the value of the property belonging to such persons in the country, without the intervention or authority of "the law of the land."

Blackstone says: "The third absolute right of every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of his acquisitions, without any control or diminution, save only by the laws of the land."

"No person can be deprived of his property without due process of law" by the Legislature or any other power of the Government. When a law annihilates or materially impairs the value of property, or strips the owner of his proper care and control over it, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a Constitutional provision intended expressly to shield private rights from the exercise of arbitrary power. (Wynehamer *v.* The People, 14 New York, 398.)

Judge Hare says:

"The Constitution does not define the deprivation which it prohibits; but the authorities establish that it need not be entire, or consist in the dispossession of the owner or destruction of the thing, and may, on the contrary, arise from an act which renders the thing less useful or valuable, or a law forbidding its appropriate use and enjoyment, although the owner is not dispossessed." (2 Hare's Am. Con. Law, p. 753.)

2. The effect of the enforcement of this Act will appear from the operation of the Exclusion Act of 1888, as stated by the Ministers of the Chinese Government in their correspondence with the Secretary of State upon that subject. The facts stated in that correspondence have never been denied by the United States.

Mr. Chang Yen Hoon in his note to Mr. Blaine, of July 8, 1889, states:

"By the treaty of 1868, Chinese subjects were guarantied 'the same privileges, immunities, and exemptions in respect to travel or residence' in the United States 'as the subjects of the most favored nation,' and by the treaty of 1880 Chinese laborers now in the United States are 'allowed to go and to come of their own free will and accord, and shall be accorded all the rights, privileges, and immunities which are accorded to the subjects of the most favored nation.' Under the operations of these treaty stipulations, during the past twenty years a large number of Chinese subjects, have come to the United States and established very considerable propery and commercial interests, to the proper enjoyment of which the right of free exit and entrance to the United States is an essential condition, and without the enjoyment of which they will necessarily suffer great hardship and pecuniary loss. The Act of Congress of 1888 deprives them of this privilege, which is accorded to the subjects of all other nations. It must be conceded that if this Act is to be enforced the Government of the United States should, in justice and according to the principles of international law as interpreted by its own authorities, be held responsible to the Government of China for all the losses and damages occasioned thereby to Chinese subjects."

The subsequent letters of Mr. Tsui to Mr. Blaine of March 26, 1890, and December 4, 1890, refer again more particularly to this subject (Senate Ex. Doc., No. 54, 52d Cong., 2d Sess.)

Mr. Tsui states that the official statistics show that at the time the Act of 1888 went into effect there were at the port of San Francisco 20,000 certificates issued under the Act of 1884, and he says :

"The tens of thousands of Chinese subjects who temporarily left the shores of the United States, armed with the signed and sealed assurance of the Government of the right to return, in almost every case left behind them in this country property, business, families, relatives, obligations, or contracts, which have been imperilled, broken up, or injuriously affected by their unexpected exclusion."

It is a matter of public knowledge that thousands of the Chinese laborers now residing in the United States have invested their earnings in laundries, ranches and stores. Such investment, however, does not bring them within the class who are exempt under the various laws, as they still continue their avocations as laborers. To deport these people summarily would be to deprive them absolutely of the property thus acquired, and to that extent would be relatively as injurious as the enforcement of the Act of 1888.

TWELFTH.

The 6th section of the act of May 5, 1892, is a bill of attainder and an ex post facto law, and is unconstitutional and void as in violation of that provision in Section 9 of Article I of the Constitution of the United States which declares: "No bill of attainder or ex post facto law shall be passed."

1. This Court, speaking by Mr. Justice Field, in the case of Cummings *v.* The State of Missouri (4 Wallace, 323), said:

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment is less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. * * * These bills are generally directed against individuals by name; but they may be directed against a whole class."

The learned Court further said:

"These bills may inflict punishment absolutely, or may inflict it conditionally. * * * 'A British act of Parliament,' to cite the language of the Supreme Court of Kentucky (Gaines *v.* Buford, 1 Dana, 510,) 'might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury.'"

The Court also said:

"And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts, they should be no less within the inhibition of the Federal Constitution.

"In all these cases there would be the legislative enactment creating the deprivation without any of the forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

"The results which would follow from clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed, and the case actually presented, is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what can not be done directly can not be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the

thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

These doctrines were reaffirmed and applied by the Court in the case of *Ex parte* Garland (4 Wall., 333, 377), which involved the question of the effect of the Act of Congress of January 24, 1865, prescribing an oath to be taken by attorneys and counsellors of the Courts of the United States, as a bill of attainder and an *ex post facto* law. And in that case the Court adjudged that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than punishment for such conduct."

Mr. Justice Field, speaking for the Court, said:

"All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included."

The learned Judge further said:

"The legislature may undoubtedly prescribe qualifications for the office, to which he must conform. It may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question in this case is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment in violation of the Constitution."

The case of *Gaines* v. *Buford* (1 Dana, 481), cited in the opinion was decided by the Court of Appeals of Kentucky in 1833, and it involved the question of the constitutionality of an act of the legislature of that

State, passed in 1824, which forfeited, without inquisition or office found, or a judgment of any judicial court, every tract of land of more than one hundred acres, unless the proprietor should, before a named day, cause certain improvements to be made on the property.

The Court of Appeals in opinions by Judge Underwood and Judge Nicholas, which must rank next to the great judgment delivered for this court by Mr. Justice Field in Cummings *v.* Missouri, declared that the legislation was void as in violation not only of the fundamental principles of every free government, but also of the constitution of the State and the Constitution of the United States.

Judge Nicholas held that the Kentucky Act of 1833 was to be judicially treated as an Act enjoining a duty on land proprietors, and, then, for the failure to perform that duty, prescribing the penalty of forfeiture, as a mode of enforcing obedience to the legislative command, and that the Act was, therefore, a highly penal law, which attempted to punish those who violated it, as for an offence against the State, by legislative decree or mandate, in violation of the State and Federal Constitutions.

Judge Nicholas said:

"To enjoin what shall be done, and what left undone and to secure obedience to the injunction by prescribing appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction, and inflict the penalty, belongs to the judicial functions.

"To command the improvement to be made, and declare forfeiture of title as the penalty for failing to make it in the manner they are done by the act of 1824, is pure legislation.

"To ascertain that Gaines had not made the required improvement, and thereupon condemn his title as forfeited to the State, belongs not properly to legislation, but to adjudication.

"The 6th section of the 10th article of the Constitution says, the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. To what class of cases does this apply, and where is this right to remain inviolate, if it be not where the citizen is pursued for an infraction of the penal law?

"What law is so penal, excepting those affecting life and liberty, as this, which forfeits a man's real estate—which takes from Gaines for a single omission of duty twelve thousand acres of land?"

The most interesting part of the opinion of Judge Nicholas, as the part which was cited by this Court, with approval, in Cummings *v.* The State of Missouri, is that devoted to the discussion of the question whether the act of Kentucky fell under the inhibition of the Constitution of the United States against the passage of bills of attainder, as it was held it did.

The act was adjudged to be in effect a bill of pains and penalties, and, therefore, a bill of attainder within the meaning of the Constitution.

Judge Nicholas said:

"A condemnatory act of the legislature inflicting upon an individual, or class of individuals, pains and penalties, is as much within the reason of the prohibition, as if it inflicted capital punishment. They are both equally hostile to the principles of civil liberty and the spirit of our written constitutions. They are equally engines of tyranny and oppression and equally unsuited to the government of a free people."

Upon the question of the specific character and effect of the Kentucky act of 1824, as a penal law, and a bill of attainder, within the prohibition of the Constitution, the court said:

"That it is a highly penal law, inflicting the most grievous penalty for the omission of the thing commanded to be done, is beyond dispute. But it is not the weight of the penalty, nor the character of the offence,

that makes it a bill of attainder. But it is the confiscation of the property of individuals, which it attempts to make before any condemnation, and without any condemnation, for the offence designated, either *in personam* or *in rem*. When the State rightfully acquires the property of a citizen by forfeiture, it is, as the punishment, annexed by law, to some illegal act or negligence of its owner. That the Legislature may make the act or omission illegal, and prescribe forfeiture as the penalty, is admitted. But it is denied that it can of itself inflict the punishment. So far as the act in question undertakes to divest the title out of Gaines, and vest it in the State, it is a legislative infliction of the penalty; it is an assumption to that extent of judicial magistracy, without affording the accused the benefit of those forms and guards of trial, which are his constitutional right, whenever he is sought to be punished, either in his person, or by forfeiture of his property, for alleged violation of the penal enactions of the State. * * * The right to forfeit is an incident merely to the power to punish guilt. Without the guilt, the forfeiture can not be incurred. The guilt can not be ascertained by the Legislature, nor otherwise than by a direct criminal procedure of some sort, and a judicial determination thereon."

The opinion then shows that by a bill of attainder, punishment may be inflicted conditionally, as well as absolutely, and that such a bill may be applied to the punishment of offences thereafter to be committed, or for criminal omissions thereafter occurring, as well as to the punishment of offences already committed.

Judge Nicholas said:

"A bill of attainder is not necessarily an *ex post facto* law. A British act of Parliament might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury, the prisoner when

brought to the bar being merely asked what he has to allege why execution should not be awarded against him."

The learned Judge further observed:

"It is unnecessary to say whether either of the several clauses of the constitution referred to would, singly, be sufficient to invalidate the act. But that some or all of them together do invalidate it, I feel no doubt. They all tend to show that the Legislature cannot, in this mode, by any mere act of its own, divest a citizen of his property. They constitute together, in letter, spirit and general scope of policy, a mass of obstacle to the divestiture of Gaines' title, in the manner contemplated, which to my mind is perfectly insurmountable."

The learned Judge, finally, said:

"Nor will these suggestions be answered by the obvious difficulty, if not impracticability, of enforcing the forfeitures by direct criminal proceedings against such a host of unknown and unascertainable delinquents. If the power attempted to be exercised, is a wholesome one, and was wisely and equitably exerted in the given instance, it will be matter of regret that other and higher considerations induced the framers of the Constitution to withhold from the legislature the power of giving such wholesale and summary redress. If, on the contrary, the existence of such power would be noxious to the common weal, and its exercise in this instance was oppressive, unwise, unequal, and unjust, then it will be matter for congratulation, that the wisdom of the Constitution has secured the community against such extensive oppression, and that the very extent of the evil intended, is of itself a security against its perpetration."

It is submitted upon those authorities that the 6th section of the act of 1892, is a bill of pains and penalties directed against the Chinese laborers who fail either negligently or wilfully to make application for certifi-

cates of residence, according to the requirements of the act, and who are found without such documents in their possession, which is within the inhibition of the Constitution.

The enactment creates the offence imputed to such persons, and inflicts the punishment by arrest and exportation through the agency of the ministerial and judicial officers who are called upon to execute it, without any of the ordinary forms and guards provided for the security of persons charged with offences against the United States in the administration of justice by the established tribunals.

2. It also appears that the enactment operates as an *ex post facto* law upon and in respect to many Chinese laborers rightfully and lawfully in the United States who may have been unable to make application for these residence certificates by reason of death, inaccessibility, or absence of the witnesses required by the collectors to support such applications, and who may have thus come under the condemnation of the act as persons who are to be deemed unlawfully in the United States.

Under the Restriction Act of 1864, such persons, if proceeded against by the United States upon a claim or charge that they were unlawfully in the country, would have been entitled to a judicial hearing before a Justice, Judge, or Commissioner, with all the rights accorded at such a hearing for the protection of their personal liberty.

The effect of the act of 1892 is to deprive such laborers of the benefit of a judicial hearing in a matter which substantially involves the charge of an original violation of the law of the United States, and thus alters their situation in respect to the matter to their disadvantage.

This Court, speaking by Mr. Justice Miller, in the case of *Kring* v. *Missouri* (107 U. S., 221, 228) said that

it was not to be supposed that the opinion delivered by Mr. Justice Chase in the leading case of Calder *v.* Bull (3 Dall., 386) undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable.

The court in the Missouri case approved the definition of an *ex post facto* law given by Mr. Justice Washington in the case of United States *v.* Hall (2 Wash., 366), to the effect that it is a law "which, in relation to the offence, or its consequences, alters the situation of a party to his disadvantage," and it also commended the observations of Judge Denio in Hartung *v.* The People (22 N. Y., 95), that "no one can be criminally punished in this country except according to a law prescribed for his government before the supposed offence was committed, and which existed as a law at that time."

In Kring *v.* Missouri the court expressly adjudged that no substantial right which the law gave a party at the time to which his offence, if any, relates, can be taken from him by any *ex post facto* legislation, agreeably to the Constitution of the United States.

THIRTEENTH.

The 6th section of the Act of 1892, as has been shown, is not and can not be treated as an enactment designed for the expulsion of the Chinese subjects affected by its provisions, under or in the exercise of any supposed general, inherent or absolute sovereign power of the United States, under the Constitution, over aliens residing in the country in the peace of the United States and the several States in which they may have established their homes, but if any different view of the intention and design of this enactment should be suggested on the part of the United States, it is maintained on the part of the appellants, that Congress has not been invested by the Constitution with the power to enact a law, in time of peace, expelling from the country friendly aliens lawfully commorant and actually residing therein, except as a punishment for crime.

This proposition and the general subject to which it relates are considered and discussed elaborately and ably by Mr. Evarts and Mr. Choate in the brief presented by them to the Court in these cases, and it is unnecessary that the undersigned should review or restate the historical and constitutional arguments adduced in support of the views submitted to the Court, on the part of the appellants, by those learned gentlemen.

FOURTEENTH.

This Court should reverse the orders remanding the appellants, and direct that they be discharged.

The general offence against justice, humanity, reason, and religion of which the present legislation is guilty, is apparent upon the face of it, and has been admitted

publicly even by some who were originally unable to perceive the natural and inherent objections to it.

The United States, when it entered into treaty relations with China, pledged to that great nation its public faith that every attempt by the States, as well as by the National Government, to exercise power over her subjects entitled to reside permanently or temporarily in the country, not warranted by the organic law of the land, should be "caught upon the broad shield of our blessed Constitution and our equal laws."

The Constitution of the United States has been found adequate for the protection of such Chinese subjects, against unjust and un-Christian legislation of some of the States.

The issue here and now is whether the Constitution is adequate for their protection against such legislation on the part of the National Government.

It would be fortunate for both Governments if it should be ascertained by the judgment of this tribunal, that the enactment in the sixth section of the Act of 1892 is as unconstitutional as it is unjust and discreditable to the country.

J. HUBLEY ASHTON,
Of Counsel for Appellants.

APPENDIX "A"

[PUBLIC.—NO. 50.]

An Act to prohibit the coming of Chinese persons into the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this Act.

SEC. 2. That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the Justice, Judge, or Commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this Act or the Acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such Justice, Judge, or Commissioner, his lawful right to remain in the United States.

SEC. 4. That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided.

SEC. 5. That after the passage of this Act, on an application to any Judge or Court of the United States in

the first instance for a writ of *habeas corpus*, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this Act, and who are entitled to remain in the United States, to apply to the Collector of Internal Revenue of their respective districts, within one year after the passage of this Act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this Act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States Customs Official, Collector of Internal Revenue or his deputies, United States Marshal or his deputies, and taken before a United States Judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said Judge, that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the Court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this Act ; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases, the cost of said arrest and trial shall be in the discretion of the Court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge.

SEC. 7. That immediately after the passage of this Act, the Secretary of the Treasury shall make such rules

and regulations as may be necessary for the efficient execution of this Act, and shall prescribe the necessary forms and furnish the necessary blanks to enable Collectors of Internal Revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants, such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the Collector of Internal Revenue for the district within which such Chinaman makes application.

SEC. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars or imprisoned in the penitentiary for a term of not more than five years.

SEC. 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the Collectors of Internal Revenue, for services performed under the provisions of this Act in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

Approved, May 5, 1892.

APPENDIX "B."

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., *April 8, 1893.*

To Collectors of Internal Revenue:

Section 6 of the Act of Congress approved May 5, 1892, entitled "An Act to prohibit the coming of Chinese persons into the United States," provides that it shall be the duty of all Chinese laborers within the limits of the United States at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the Collector of Internal Revenue of their respective districts within one year after the passage of this act for a certificate of residence.

Section 7 of said Act provides that such certificates shall be issued without charge to the applicant, and shall contain the name, age, legal residence, and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the Collector of Internal Revenue for the district in which such Chinaman makes application.

The honorable Secretary has issued the accompanying revised rules and regulations, deemed necessary by him for the execution of this act, and copies of such regulations will be furnished to Collectors of Internal Revenue.

Collectors of Internal Revenue are hereby required to see that certificates of residence are issued to such Chinese persons as are entitled to them, and to deliver such certificates in localities convenient to the applicants. Collectors will be careful to accurately fill out the original and duplicate certificates and the stubs thereof.

The duplicate certificate and the application will be kept on file in the office of the Collector in whose district the applicant resides.

The stubs, properly filled out, will be forwarded to this office as soon as the certificates contained in book are consumed.

At the close of business on May 5, 1893, all books of certificates wholly or partially used will be promptly returned to this office, with the stubs of the certificates issued therefrom correctly filled out.

JOHN W. MASON,
Commissioner.

Regulations for the Issue of Certificates of Residence to Chinese Laborers, and Chinese Persons other than Laborers, under the Provisions of the Act of May 5, 1892.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *April 8, 1893.*

Section 7 of the Act of Congress approved May 5, 1892, entitled "An Act to prohibit the coming of Chinese persons into the United States," provides "that immediately after the passage of this Act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this Act, and shall prescribe the necessary forms and furnish the necessary blanks to enable the Collectors of Internal Revenue to issue the certificates required hereby, and make such provision that certificates may be procured in localities convenient to the applicants," etc.

In accordance with the foregoing authority, the following rules and regulations are prescribed for the purposes therein indicated, to wit:

APPLICATIONS FOR CERTIFICATES OF RESIDENCE.

Collectors of Internal Revenue will receive applications on the following form, at their own offices, from such Chinese as are conveniently located thereto, and will cause their deputies to proceed to the towns or cities in their respective divisions where any considerable number of Chinese are residing, for the purpose of receiving applications:

No. ——.

Application of Chinese laborer (or Chinese person other than laborer) for certificate of residence under Act of May 5, 1892.

I, —— ——, a Chinese ——, hereby make application to the Collector of Internal Revenue for the ——

district of —— for a certificate of residence under the provisions of the Act of Congress approved May 5, 1892, and state that I arrived in the United States on the —— day of ——, 18—, at the port of ——, per ——, and that I was lawfully within the limits of the United States residing at ——, ——, on the 5th day of May, 1892. That my age was —— years on my last birthday, and that my present local residence is at ——, and my occupation is ——.

(Sign here.) —— ——.

Subscribed and sworn to before me this —— day of ——, 189—, at ——, ——.

—— ——,

Deputy Collector Internal Revenue —— District ——.

No applications will be received later than May 5, 1893.

Collectors and deputies will give such notice through leading Chinese, or by notices posted in the Chinese quarter of the various localities, as will be sufficient to apprise all Chinese residing in their districts of their readiness to receive applications and the time and place where they may be made.

All applications received by deputies must be forwarded to the collector's office, from whose office all certificates of residence will be issued, and sent to the deputy for delivery.

AFFIDAVIT OF WITNESS.

The affidavit of at least one credible witness of good character to the fact of residence and lawful status within the United States must be furnished with every application. These affidavits shall be, in substance, as follows:

Affidavit of witness to application of Chinese laborer (or Chinese person other than laborer) for certificate of residence.

I, ——— ———, residing at ——— ——, do solemnly swear that I am well acquainted with ——— ———, a Chinese ——— whose application for a certificate of residence is set forth on a preceding page; that I know of my own knowledge that on the 5th day of May, 1892, said ——— ——— was within the limits of the United States,

residing at ———, and I am informed and verily believe that said ——— ——— arrived in the United States on the ——— day of ———, 18—, per ———, and was lawfully within the United States on said 5th day of May, 1892; that the said applicant now resides at ———, and is by occupation a ———.

Signature of witness: ——— ———.

Subscribed and sworn to before me this ——— day of ———, 189—.

———,
Deputy Collector Internal Revenue,
——— District of ———.

If the applicant is unable to furnish such witness satisfactory to the Collector or his Deputy, his application will be rejected, unless he shall furnish other proof of his right to remain in the United States, in which case the application with the proofs presented shall be forwarded to the Commissioner of Internal Revenue for his decision.

The witness must appear before the Collector or his Deputy, and be fully questioned in regard to his testimony before being sworn.

ISSUE OF CERTIFICATES OF RESIDENCE.

Certificates of residence in the following form will be furnished, bound in books of one hundred each, and numbered consecutively from one upward, to wit:

No. ——. (Original.)

UNITED STATES OF AMERICA.

Certificate of Residence issued to Chinese Laborers (or Chinese Person other than Laborer) under the provisions of the Act of May 5, 1892.

This is to certify that ——— ———, a Chinese ——— now residing at ———, has made application, No. ——, to me for a certificate of residence under the provisions of the Act of Congress approved May 5, 1892, and I certify that it appears from the affidavit of witness submitted with said application that said ——— ——— was within the limits of the United States at the time

of the passage of said Act, and was then residing at ———, and that he was at that time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese ———:

Name.	Age.	Local residence.	Occupation.	Height.	Color of eyes.	Complexion.	Physical marks or peculiarities for identification.

Given under my hand and seal this ——— day of ———, 189—, at ———, State of ———.

[COLLECTOR'S SEAL.] ——— ———,
Collector of Internal Revenue,
——— District of ———.

(Stub.)

Name.
Age.
Local residence.
Occupation.
Height.
Color of eyes.
Complexion.
Physical marks or peculiarities for identification.

The original, duplicate, and stub will be printed on one page so that the original and duplicate can be cut off, leaving the stub in the book.

All books of certificates must be kept in the Collector's office and all certificates must be issued from there.

All certificates must be accounted for, and if any certificate is destroyed before being issued an affidavit must be attached to the book in which it was contained showing the facts in regard to its destruction.

After signing the certificate, and before issue, the collector must affix his official seal thereto.

ISSUE OF CERTIFICATES OF RESIDENCE TO CHINESE PERSONS OTHER THAN LABORERS.

The same forms will be used in issuing certificates of residence to Chinese persons other than laborers as are used in issuing certificates to laborers, by inserting between the words "Chinese" and "laborers," wherever they should occur in said forms, the words "person other than," a blank space being provided in each form sufficient to admit of writing the four words, "person other than laborer."

ISSUE OF DUPLICATE ORIGINAL CERTICATES.

In all cases of loss or destruction of original certificates of residence where it can be established to the satisfaction of the Collector of the district in which the certificate was issued that such loss or destruction was accidental, and without fault or negligence on the part of the applicant, a duplicate of the original may be issued under the same conditions that governed the original issue. Across the face of each of such duplicates so issued and the stub thereof the Collector shall write, in red ink, the words, "Issued in lieu of original certificate No. ——— which, upon evidence submitted, appears to have been unavoidably lost" [or destroyed, as the case may be], to which shall be attached the Collector's official signature. And upon the issue of every such duplicate certificate the Collector shall, by circular letter, report the fact to the office of the Commissioner of Internal Revenue and to each Collector of Internal Revenue, embracing in such report the serial number of the certificate for which the duplicate was issued and the name and personal description of the person to whom issued, as appearing in the original application.

COLLECTOR'S RECORD OF CERTIFICATES ISSUED.

Collectors of Internal Revenue will keep in their offices an alphabetical record of all certificates of residence issued. A suitable book for this purpose will be prepared by the Treasury Department and furnished to Collectors in due time.

DEFINITIONS.

The persons referred to in the Acts of Congress to which these regulations apply, and whose immigration into the United States is prohibited, are limited to Chinese laborers. No class of Chinese are prohibited from coming into the United States, or remaining here, except such as may properly and within the meaning of said statutes be known as "laborers." But persons other than laborers must present as a condition precedent to landing the certificate required by section 6 of the Act approved July 5, 1884.

Collectors of Internal Revenue and their deputies are instructed that all classes of skilled and unskilled laborers, and persons employed in mining, as well as hucksters, peddlers, and persons engaged in taking and drying or otherwise preserving shells or fish for home consumption or exportation and laundrymen shall be classed as laborers. Persons who are employed in stores, but who are not owners or part owners in the business, shall be classed as laborers. A person to be exempted from the operations of this law as a merchant must be an owner or part owner of a *bona-fide* mercantile establishment.

J. G. CARLISLE,
Secretary.

14 Q.B. 1892

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JAMES H. McKENNEY
CLERK

THE CHINESE REGISTRATION CASES

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

FONG YUE TING, APPELLANT,
vs.
THE UNITED STATES AND JOHN W. JACOBUS, individually and as marshal of the United States in and for the southern district of New York, respondents. } No. 1345.

WONG QUAN, APPELLANT,
vs.
THE UNITED STATES AND JOHN W. JACOBUS, etc., respondents. } No. 1346.

LEE JOE, APPELLANT,
vs.
THE UNITED STATES AND JOHN W. JACOBUS, etc., respondents. } No. 1347.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE RESPONDENTS.

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J. G. CARLISLE,
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BRIEF FOR THE RESPONDENTS.

STATEMENT.

CASE No. 1345.

The case of Fong Yue Ting is that of a Chinese alien resident laborer, who has continuously lived in this country since 1879, and who has refused to comply with the provisions of section 6 of the act of May 5, 1892. He was arrested by the United States Marshal for the southern district of New York as being without the certificate required by law, and at once, and before he was taken before a United States judge, presented to the circuit court his petition for habeas corpus, which was issued, and upon the return thereof the writ was dismissed, and he was remanded to the custody of the marshal. He appealed to this court.

CASE No. 1346.

The facts in this case are substantially the same as in the preceding case, except that Wong Quan, after his arrest for a like offense, was taken before a United States judge, who immediately ordered that he be remanded to the custody of the marshal and deported from the United States. A petition for habeas corpus was then presented to the circuit court of the United States in and for the southern district of New York, with the usual prayer. The writ issued, and upon the return thereof, the same

was dismissed and the petitioner remanded to the custody of the marshal, from which order an appeal was taken to this court.

CASE No. 1347.

The facts in this case are similar to the foregoing, except that Lee Joe applied on April 11, 1893, to the collector of internal revenue of the district where he had then resided for over a year, for the certificate required by law. In support of his right thereto he produced two Chinese witnesses to prove the necessary facts. The collector refused the application on the ground that the witnesses were not credible, because persons of the Chinese race. There does not seem to have been any attempt to procure other witnesses, or to compel the issuance of the certificate, or acceptance of the evidence of the witnesses tendered.

The appellant was arrested on May 6, 1893, charged with being a Chinese laborer found without a certificate of residence, contrary to the act of May 5, 1892. He was thereupon brought before a United States judge, to whose satisfaction he clearly established that, because of the refusal of the collector of internal revenue to give him the certificate of residence for which he applied, he was without such certificate by reason of an unavoidable cause. This the appellant established by his own testimony and the testimony of a Chinese witness. Thereupon the appellant attempted to prove to the satisfaction of the court, by himself and by the same witness by whom he had proved that he was without such certificate by reason of

an unavoidable cause, that he was a resident of the United States at the time of the passage of the act of May 5, 1892. The said United States judge, however, notwithstanding the evidence offered by the appellant to prove the fact of residence, ordered that the appellant should be remanded to the custody of the marshal and deported from the United States, as provided by the act of May 5, 1892. The appellant then presented a petition to the circuit court of the United States in and for the southern district of New York, praying that a writ of habeas corpus should issue, directing the United States marshal, in whose custody he was then detained, to produce him before the said court. A writ of habeas corpus was thereupon issued, and upon the return thereof the same was dismissed and the appellant remanded to the custody of the marshal. An appeal was then taken to this court from the order dismissing the said writ of habeas corpus.*

* This statement of the cases is prepared from information furnished by the counsel of the appellants. At this writing the records have not been received.

ARGUMENT.

It is submitted that these cases can not be distinguished from the *Chinese Exclusion Case* (130 U. S., 581), and that the argument might safely stop with a reference to the very able and comprehensive opinion in that case.

In view of the fact that the controversy has assumed an international character, and that the principles there announced have been assailed with the utmost vehemence, it seems permissible to examine the subject at greater length, even at the risk of repetition, and the charge of undertaking a work of supererogation

The history of our relations with the Chinese Empire, as well as the legislation upon the subject of Chinese immigration, are admirably stated in the opinion referred to, and will not be here repeated.

The decision in that case and the failure of the treaty of that year—1888—to receive the sanction of the Imperial Government of China, was followed by the so-called Geary act, the constitutionality of which is here denied. The act is in the following words:

> CHAP. 60.—An act to prohibit the coming of Chinese persons into the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act.

SEC. 2. That any Chinese person or persons of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: *Provided*, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the removal of such person to that country, he or she shall be removed to China.

SEC. 3. That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

SEC. 4. That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided.

SEC. 5. That after the passage of this act on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay.

SEC. 6. And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage

hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court. And any Chinese person other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right may apply for and receive the same without charge.

SEC. 7. That immediately after the passage of this act the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants, such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence, and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application.

SEC. 8. That any person who shall knowingly and falsely alter or substitute any name for the name written in such

certificate or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars or imprisoned in the penitentiary for a term of not more than five years.

SEC. 9. The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue for services performed under the provisions of this act in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued.

Approved May 5, 1892.

I.

THE ACT OF MAY 5, 1892, IS REASONABLE AND HUMANE IN ITS PROVISIONS FOR REGISTRATION.

An examination of the act shows that its purpose is not to secure the deportation of Chinese laborers resident in the United States, as counsel erroneously assume, but to provide a system of registration and identification of such as are here. I assume that this is a lawful purpose, whether applied to citizens or aliens. There are numerous laws requiring the registration and identification of citizens; in most States compliance with such laws is a requisite for the exercise of the elective franchise. Such requirement also extends to births, deaths, matters of social and political science in many localities, taxation—indeed to a multitude of the diversified interests of society and government; in fact the right of the Government to require an identification and registration of its citizens, of their possessions and resources, and the location of all these, has never been seriously disputed. All this is so generally recognized

as necessary information for the law-making and law-executing branches of the Government, that the right to require it has passed unchallenged, in modern times at least.

That the right extends to the subject of a foreign power residing in our territory requires neither argument nor authority in this court. It is a right asserted by all governments at all times. The *purpose*, then, of the act, to wit, *identification*, is clearly a lawful purpose.

The next question is, whether the means by which the purpose is attained are lawful. In the consideration of this question I admit, for the purpose of the argument, that Chinese residents are protected to the same extent as citizens by the constitutional guaranties—a proposition to be examined later.

Section 6 of the act requires the Chinese laborers embraced within its provisions "to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence."

Section 7 of the act requires the Secretary of the Treasury to make "such rules and regulations as may be necessary for the efficient execution of this act." He is required to make "such provisions that certificates may be procured in localities convenient to the applicant," and it is elsewhere provided that such certificate shall be issued without charge to the applicant.

It thus appears that ample time—one year—was given to procure the requisite certificate; that compliance was made easy and cheap by the provision that localities convenient to the applicant should be selected and the certifi-

cate issued without charge; and, finally, the duty of the collector was made mandatory upon compliance with the prescribed conditions. In the observance of the law to this point there was surely neither difficulty nor hardship.

But it is said that the collector of internal revenue may refuse to do his duty; that he is invested with arbitrary power, and, living in a community hostile to Chinese residents, he exercises his power in a harsh and arbitrary manner—or may do so.

It is sufficient to say of this that such presumptions are not to be indulged in with reference to official conduct, and that this court can not reasonably be asked to thus discredit the executive branches of the public service.

Another answer is found in the fact that if the resident laborer could not, when he applied therefor, produce the requisite and satisfactory proof to entitle him to his certificate, there was nothing to prevent his again applying; and this could be repeated during the entire year allowed by the law. The most ample opportunity was thus afforded.

Again, the law is mandatory, and there is nothing to prevent any Chinese laborer who deemed himself entitled to such certificate, going into the proper court, and by mandate securing the recognition of his rights. It is confidently submitted that such an application would have been successful in any court against the wanton or willful or improper disregard of the proof or rights of the Chinese resident. It is not thought that the rights or remedies are different, or involve greater difficulties than surround the citizen who is unjustly or arbitrarily refused registra-

tion as a condition precedent to the exercise of the elective franchise.

Assuming that the purpose and the means of attaining it are lawful, up to the point of obtaining the requisite certificate, I come now to a consideration of the condition that confronts us in cases where no certificate has been obtained upon the expiration of the year allowed by law.

We have in these cases subjects of an alien power, who have deliberately defied the laws of the country in which they are resident, and under whose beneficent institutions they seek to live. Afforded every opportunity to obtain the certificates required, they have refused, basing their refusal upon the belief, perhaps engendered by hasty advice of distinguished members of the American bar whose multifarious engagements prevented a full consideration of the question involved, that constitutional or treaty rights were thereby invaded.

We have the high authority of this court, often found in its decisions, that the wise and prudent judge will never declare an act of Congress unconstitutional unless it is plainly so; and in matters involving personal liberty, a defiance of his country's laws, and perhaps international strife, the American lawyer and patriot—terms that should be synonymous—might well hesitate to make such a declaration against a law that could be easily complied with, and that, too, without expense. And yet it has been proclaimed throughout the length and breadth of the land that compliance need not be yielded to the mandates of this law, because, in the *opinion* of certain eminent legal gentlemen, the law is unconstitu-

tional—an opinion which, as I shall seek to show, is equivalent to a denial of the sovereignty of the United States in the exercise of the enumerated powers of the Constitution, of the authority of the previous decisions of this court, and of well-settled principles of the law of nations.

Under such circumstances it is submitted that the sickly sentimentality which is calculated to adorn orations of a certain class, addressed to other audiences than this court, is wholly out of place. We have here the willful violation of our law, upon the advice of counsel, by a large class of people owing allegiance to a foreign sovereign, by a people not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits often of the most pernicious character, working at wages that debase our own laboring classes, not bound by any considerations of the sanctity of an oath, given to evasions of other laws of Congress, and by that body, whose action within constitutional limits even this court may not question, declared to be a people of such a character and so inimical to our interests as to require that their coming shall be prohibited, and means taken to identify those already here, in order that frauds upon the law by the incoming of others of their class may be prevented and the public welfare thereby subserved.

To such a people, so described both by the learned members of this court and by the Congress of the United States, this law is to be applied.

And how applied?

Upon the expiration of the year within which the law had enjoined upon the Chinese laborer an easy and reasonable duty under certain penalties, having failed to obey its mandates, he is arrested "and taken before a United States judge, whose duty it shall be to order that he be deported from the United States * * * unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act; and if upon the hearing it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost."

Then follow provisions with reference to those who have lost their certificates previously obtained, and fully, it is thought, protecting the rights of such.

The inquiry now is what part of the provision quoted invades the constitutional or treaty rights of the Chinese laborer resident in the United States at the date of the passage of the act?

It is admitted, as before stated, for the purposes of this inquiry only, that such Chinese resident laborers are within the protection of the Constitution. An analysis of the provision quoted shows that—

(1) The failure to have a certificate after the expiration of a year puts the burden of proof upon the Chinese resident laborer.

(2) The judge before whom such laborer is brought is to try primarily the question of the fact of possession of a

certificate—that is, whether the person before him has complied with a law enjoining a duty upon him.

(3) If he has not complied with such law it is made the duty of such judge to order his deportation unless—

(*a*) He establishes clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate;

(*b*) He establishes clearly to the satisfaction of the court, and by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act.

If upon the hearing it shall appear that he is so entitled to a certificate it shall be granted upon his paying the cost.*

(4) It is clear that a trial by jury is not contemplated by this act. The Chinese resident laborer who has defied or disregarded the law for an entire year, and is found thereafter within the territory of the United States, is required to establish his right to remain here, or his excuse for noncompliance, to the satisfaction of the judge.

Do any of these elements of the law offend against the Constitution?

*I am aware that the conjunctive "and" is used between the two conditions upon which the judge is authorized after the expiration of the year, and upon the hearing, to direct the issuance of the certificate required by law, and it may be contended that such certificate is only permissible when both the conditions concur which I have separated into "*a*" and "*b*." In support of the constitutionality of the act it is submitted that the word "and" would be construed "or" by any court. In making this suggestion I do not wish to be understood as admitting in behalf of the United States that such separation is necessary to save the act from condemnation under the constitution, but rather to suggest it as a reasonable interpretation of the language used. Its constitutionality is affirmed in behalf of the United States in any event.

I discuss them in the order in which I have arranged them.

1. *The burden of proof and presumption of evidence from a given state of facts.*

Legislation of this character is too common and has been too long sustained to permit question at this time. It applies equally to criminal and civil jurisprudence.

There are many instances of the application of the rule of presumptive evidence, as, that every person of sound mind is presumed to contemplate the necessary, natural, or legal consequences of his act. A statute declaratory of this presumption would not violate any constitutional right. Such presumptions are applied to deeds and their execution; to death and the disposition of estates after absence for a term of years; to titles as result of possession; to patents for inventions as affording a prima facie right; to contracts as affected by place of execution and of performance; to indorsements as importing consideration; to payments and grants from lapse of time; to regularity of judicial and official action; to criminal intent from an unlawful act, to possession of stolen property, etc.

The right to thus change the burden of proof in both civil and criminal cases has been asserted in the most explicit manner and sustained in an opinion of great learning by the Supreme Judicial Court of Massachusetts in *Holmes* v. *Hunt* (122 Mass. 505).

2. The right of Congress to require aliens or citizens to register, or obtain certificates of identification.

This right has also in substance, as is thought, been often asserted. The instances requiring registry as a

condition of the exercise of the elective franchise for purposes of taxation—of births, marriages, deaths—for purposes of military service, and as necessary to the conduct of different kinds of business, are familiar instances occurring to all.

In many instances possession of a certificate or other evidence of the fact into which the Government makes its inquiry, or has expressed its interest, is also provided for or made necessary. It is supposed that no challenge will be made of this requirement in and of itself.

The more important objections are now to be met, and in their discussion, 3 and 4 (*supra*) may be considered together and stand as follows:

Has Congress the power to authorize a judge without the intervention of a jury to sentence to deportation a person who has not procured and is not in possession of the prescribed certificate.

As a broad question applying to the citizen I think it must be conceded that Congress would not have such power, and therefore the mode of trial and the extent of punishment prescribed by this act must be held unconstitutional if Chinese resident alien laborers have all the rights and immunities of American citizens under the Constitution. I do not stop to discuss whether the proceeding herein provided is a criminal prosecution within the meaning of our fundamental law or not. I assume that "due process of law" in our Constitution is equivalent to "law of the land" in Magna Charta, and that under those rights which have come to be recognized as the birthright of an American citizen it would not be possible for a judge

without the intervention of a jury to condemn such citizens to exile.

It seems obvious that the proceedings contemplated by this act are not criminal proceedings requiring presentment by a grand jury and trial by a petit jury as prescribed by the Constitution. They are rather a method adopted by the political department of the Government to carry out its wishes in a matter within its province, and not presenting, as is thought, any judicial question. In the exercise of the police or political powers of the Government in the presence of a necessity to act promptly in the promotion of the public safety and welfare, it is submitted that those requirements of the Constitution applicable to the property and personal rights of the citizen in ordinary circumstances have never been held to apply. These arrests and so-called punishments must be, and in fact have been held to be, methods of detention prescribed by the political power pending an investigation of the legal *status* of the alien, and his deportation if he is found not entitled to remain. (*United States* v. *Wong Sing*, 51 F. R., 79; *United States* v. *Hing Quong Chow*, 53 F. R., 233; *In re Ah Yuk*, 53 F. R., 781; *In re Ng Loy Hoe*, 53 F. R., 914; *In re Sing Lee*, 54 F. R., 334.)

It is true that the first two opinions here cited assume that constitutional provisions would be violated if these proceedings are to be deemed criminal in their character, and not a mere method of executing the will of the political department of the Government upon a subject within

its enumerated powers. This assumption rests upon the idea that alien resident Chinese laborers are entitled to the same protection under the Constitution as citizens of the United States—a subject to which attention will be given later.

It may be admitted, by way of premise, that it has been the general policy of this Government to encourage immigration. The enormous increase of our population and wealth, unparalleled in the history of any other country, and now continued for more than a century, has been in a large measure rendered possible through this policy; and yet it has not been a policy so general in its character as to be without exception. The Alien and Sedition Law of 1798, and the numerous restrictive laws looking to the protection of our people against disease, paupers, and criminals, are well known. Now that our public domain is nearly exhausted, and immigrants flock to the cities, where they form separate communities, retaining the habits, ideas, and political and social tendencies of their respective countries, entering upon a destructive competition with American labor, it is not surprising that many of the ablest statesmen of our country have reached the conclusion that the lines of restriction should be greatly extended and strengthened. It is generally conceded that the Mongolians are practically incapable of assimilation with our people. They come as a foreign element, and they remain as such. The right of Congress to restrict and even forbid such immigration, must be conceded as a question of both international and constitutional law. Of the necessity for such exclusion the political departments

are the sole judges. The judiciary can not pass upon that question.

And so and for like reasons it is thought that the methods and means by which the political departments seek to regulate, limit, or terminate the residence of such aliens as are already here are likewise exclusively within the jurisdiction of the political departments, and beyond the confines of judicial power.

The authority to protect treaty rights, in so far as the treaties go beyond the rules of international intercourse and agreement, and establish regulations or guaranties having the force of municipal law, is conceded. It is submitted that if it were to be conceded that the treaty of 1880 was yet in force and in no respect abrogated by subsequent action of Congress, this legislation is authorized thereby. This leads to the second proposition, which is:

II.

THE ACT DOES NOT VIOLATE ANY PROVISION OF THE TREATY OF NOVEMBER 17, 1880, BUT IS AUTHORIZED THEREBY.

The treaty so far as it has any bearing on the question now to be considered is as follows:

ARTICLE I.

> Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, *or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof*, the Government of China agrees that the Government of the United States may regulate, limit, or *suspend*

such coming or *residence*,* but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ARTICLE II.

Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

ARTICLE III.

If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty. (22 Stat., 826.)

It is to be observed—a fact which counsel for petitioners seem to have entirely overlooked—that this treaty expressly reserves the right on the part of the United States to "*regulate, limit, or suspend such coming or residence.*" It can not be reasonably contended that the act in question does more than regulate or limit such residence; which is *suspended* through the act of the Chinese laborers in re-

* The italics are ours.

fusing to comply with reasonable regulations and limitations.

It is true that only "necessary" legislation is contemplated in this section, but I do not need to remark that Congress alone is the judge of the extent and degree of the necessity.

Article II of the treaty providing that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation," must be construed in connection with the language of section 1, to which I have just adverted. It is certainly not reasonable to suppose that after the use of the language of section 1 it was proposed to tie the hands of all subsequent Congresses, and not permit any regulations, limitations, or *suspensions of the residence* of Chinese laborers, unless like regulations, etc., were made as respects the citizens or subjects of all other nations.

However this may be, it is evident that Congress has now entered upon a policy which is intended to suspend the Chinese immigration, which might overwhelm us, and to regulate and limit and, in the event of refusal to comply with such regulations and limitations, to absolutely suspend the residence of Chinese laborers in this country. If the language in which this later intention is expressed is in neccessary conflict with the language of any treaty, then the latter must yield. Authority for this proposition is unnecessary.

III.

A NATION HAS A RIGHT, ACCORDING TO INTERNATIONAL LAW, TO PRESCRIBE THE TERMS UPON WHICH THE CITIZENS OR SUBJECTS OF OTHER NATIONS SHALL BE ADMITTED TO ITS TERRITORY; TO FORBID SUCH ADMISSION; OR, HAVING ADMITTED SUCH CITIZENS AND SUBJECTS, TO REGULATE AND LIMIT THEIR RESIDENCE THEREIN; AND, WHENEVER IT CHOOSES TO DO SO, SUSPEND SUCH RESIDENCE ALTOGETHER, AND REQUIRE THAT THEY SHALL DEPART ITS TERRITORY.

In Phillimore's International Law (2d ed.), p. 260,* it is said:

> It is a received maxim of international law, that the government of a state may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it.
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> * * * * * *
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> "This power" (as Mr. Canning observed) "had undoubtedly been exercised by the Crown, sometimes with, sometimes without, the consent of Parliament." (5 *Canning's Speeches*, p. 255.)

In Vattel's Law of Nations (pp. 107, 108) it is said:

> For, on the other hand, every nation has a right to refuse admitting a foreigner into her territory, when he can not enter it without exposing the nation to evident danger, or doing her a manifest injury. What she owes to herself, the care of her own safety, gives her this right; and, in virtue of her natural liberty, it belongs to the nation to judge whether her circumstances will or will not justify the admission of that foreigner (Prelim. Sec. 16). He cannot, then, settle by a full right, and as he pleases, in the place he has

* The list of acts given in the briefs of counsel for the appellants, showing the course of English legislation on this subject, is found in this great work at this place. It is not supposed that counsel derived it from this source, else they would have discovered the text of the learned author, which is so squarely against them.

chosen, but must ask permission of the chief of the place; and, if it is refused, it is his duty to submit. * * *

Thus, a nation whose lands are scarcely sufficient to supply the wants of the citizens is not obliged to receive into its territories a company of fugitives or exiles. Thus, it ought even absolutely to reject them, if they are infected with a contagious disease. *Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens, that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged to follow, in this respect, the suggestions of prudence.** But this prudence should be free from unnecessary suspicion and jealousy; it should not be carried so far as to refuse a retreat to the unfortunate, for slight reasons and on groundless and frivolous fears. The means of tempering it will be never to lose sight of that charity and commiseration which are due to the unhappy. We must not suppress these feelings even for those who have fallen into misfortune through their own fault. For, we ought to hate the crime, but love the man, since all mankind ought to love each other. * * *

In Creasy's International Law (pp. 196–202) it is said:

The perfect right of a State to independence gives it the power, according to positive international law, to make what regulations it pleases as to its trade and its commerce with other nations. It may place what restrictions it thinks fit on the access of foreigners to its coasts or to its interior territories for mercantile or for any other purposes. It may do this without being considered to inflict by those restrictions such an injury as amounts to a *casus belli*, though undoubtedly the withdrawal of ancient courtesies and of indulgences, which had become matters of long custom, would be a breach of the comity of nations, especially if similar indulgences were still allowed to the members of other foreign states. But no *casus belli* would arise. The State or States toward which such exclusion was practiced must retaliate only by refusing in turn to the denying nation all courtesies and beneficial intercourse under the comity of nations.

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* The italics are ours.

A State's perfect right to regulate and restrict the commerce of foreigners with it, and their access to its territories, extends also to an absolute right to forbid foreign commerce, and the access of foreigners altogether. Attempts have been sometimes made to call in question the right of any one nation thus to isolate itself from the rest of mankind, and to renew the churlish spirit of the Xenelasia, by which ancient Sparta strove to keep its peculiar institutions intact and uncorrupted. But the balance of authority is clearly in favor of the existence of such a strict right, and the balance of convenience is in its favor also. The annoyance and disappointment which the speculative and inquisitive members of other States may suffer by such exclusions (exclusions which from the nature of things and from human nature have always been and always must be of very rare occurrence) are trifling in comparison with the mischief, with the amount of quarreling and hostility, which would be caused if a strong adventurous State had a right under pretext of general good, of the advancement of civilization, or the like, to send its ships or its subjects into another State against that other's will. For authorities on the subject I will cite Sir George Bowyer and Vattel. The first says:

"A State may, without violation of international law, exclude all foreigners from its territories; though there may be particular cases in which to exclude them would be cruel and contrary to the common duties of humanity."*

"Vattel's clear doctrine on this subject ought to be taken as overruling the inferences which might be drawn from some of the expressions in the second book of Grotius, chapter 2, sections from xiii to xxiv, inclusive." * * *

Principal Woolsey has inserted a passage in the commencement of his own work in which he draws the conclusion that "Sovereignty, in the strictest sense, authorizes a nation to decide upon what terms it will have intercourse with foreigners, and even to shut out all mankind from its borders."

"6. No state can exclude the properly documented subjects of another friendly State, or send them away after they

*Bowyer, Public Law, p. 173. He refers to Vattel, as cited in the text, and to Puffendorf, Droit des Gens, 1, 3, ch. 3, Sec. 8.

have been once admitted, without definite reasons, which must be submitted to the foreign government concerned."

This last rule, which Principal Woolsey takes from Hefter without qualification, seems in part at least to be an attempt to transmute a claim of comity into a perfect right. In most of the other cases it will be seen that Principal Woolsey limits Heffter's rules, till they become claims based on the right of necessity; which is a very different foundation from that which Heffter assigns to them. Rights of Necessity will be separately considered in another chapter.

Without agreeing with all Heffter's rules about giving reasons to foreign governments, we shall be safe in holding that it is a heinous wrong to withdraw suddenly privileges, such as we have been describing, and to practice spoliation, imprisonment, or ruinous expulsion upon those foreigners who have been exercising them, in all cases where long usage has nurtured a well-founded expectation on the part of the foreigners that such privileges would continue to be respected. In such cases there is an implied promise on the part of the recipient nation to continue to respect those privileges. *And the breach of that promise would justify the state, whose subjects were thereby injured, in exacting reparation for such wrong by measures of retaliation such as have been described.** This observation does not apply to cases where the commorant foreigners are guilty of misconduct which requires instant repression.

In Bar's International Law, pp. 708, 711, it is said:

Banishment and extradition must not be confounded. The former is simply a question of expediency and humanity, since no state is bound to receive all foreigners, although, perhaps, to exclude all would be to say good-bye to the international union of all civilized states; and although in some states, such as England, strangers can only be expelled by means of special acts of the legislative power, no state has renounced its right to expel them, as is shown by the alien bills which the Government of England has at times used to invest itself with the right of expulsion. (Cf. Kluit, p. 38; Marquardsen in Rotteck's and Walcker's Staatslexicon, Art. *Auftenhaltsr*, 3, pp. 13, 14.) * * *

* Italics are ours.

> Banishment is regulated by rules of expediency and humanity, and is a matter for the police of the state. *No doubt the police can apprehend any foreigner who refuses to quit the country in spite of authoritative orders to do so, and convey him to the frontier.**

In I, Lorimer's Institutes of the Law of Nations, it is said:

> There can be no question of the right of a state to refuse its hospitality to the citizens of any other state whose presence it regards as detrimental to its interests, or whose character is a subject of national abhorrence, though it may not be possible to prove that they have committed any crime for which they can be tried by the positive law of either country. We are no more bound to harbor blackguards within the borders of the state than to permit them to enter our doors. The right of expulsion, when exercised for purposes of police, and not with a view to prevent the competition of foreign skill or labor, has been universally recognized; and the alien acts, which were passed in 1792 and 1793, in consequence of the influx of foreigners caused by the French revolution, and which have been unhappily again called for in Ireland, are declaratory of the common law of nations.

In Woolsey's International Law (§ 59) it is said:

> We have already come to the conclusion that sovereignty in the strictest sense authorizes a nation to decide upon what terms it will have intercourse with foreigners, and even to shut out all mankind from its borders. (Sec. 25.) If a protective tariff, or the prohibition of certain articles is no violation of rights, it is hard to say how far one state may not go in refusing to have commerce with another. If foreigners may be placed under surveillance, or may have various rights of citizens refused to them, why may they not be excluded from the territory? If it be said that the destination of separate states, as of separate families, is to be helpful to one another, that entire isolation is impossible, still the amount of intercourse must be left to the judgment of the party interested; and if a state, judging incorrectly,

* Italics are ours.

strives to live within itself as much as possible, is it to be forced to change its policy any more than to modify its protective tariff?

In Reddie's Inquiries in International Law (pp. 208, 209) it is said:

> There is no legal right in any state to compel another state to admit its inhabitants, or to receive its commodities and give others in exchange, however great the inducements to maintain such an intercourse and traffic. * * *
>
> The foreigners thus admitted are, of course, not entitled to the rights of citizens, nor to any general political or municipal privileges; they are aliens, unless naturalized in the manner prescribed by the internal law of the particular state. But, even as aliens, they are entitled to the ordinary protection of person and property, afforded by the government to its own subjects, viewed merely in their relation to each other as individuals. In the history of the law, indeed, we even find that such foreigners have frequently been allowed the privilege of being judged according to their own laws and by judges of their own nation. Such an arrangement, however, is a matter of contract or treaty, not of international right, each nation having the exclusive sovereignty and jurisdiction within its own territory.

There is so much misinformation and such indifference to historical fact displayed in the brief for appellants that I venture to call to the court's attention a few of the many instances where the power to expel alien strangers has been exercised, and the fact that, as such, they have not the same rights as citizens, acted upon.

Counsel begin at the time of King Alfred the Great, who, if we remember aright, devoted much effort during his reign to the expulsion of Danes from British soil. It requires no great research, however, to discover the fact that the *status* of aliens in England was always a

matter of regulation by the Crown or the Parliament. In the early times aliens coming into England were generally either merchants or artificers. They had abundant "*disabilities*," and only such "*privileges*" as the Crown or the statutes conferred upon them. For example:

The Statute 1 Rich. III, Chap. IX, Sec. IX, is as follows:

> Moreover, that no person not born under the King's obeysance, as before is said, shall exercise or occupy any handicraft, or the occupation of any handicraftsman, in this realm of *England*, but that all such persons which after the said feast of *Easter* shall come into this realm, and every of them, shall depart into their own country again, or else be servants to such of the King's subjects only as be expert and cunning in such feats, arts, and crafts, which the said strangers can occupy, (3) upon pain of forfeiture of all their goods which shall come and dwell in this realm contrary to this act, in whose hands soever they shall be found.

In the same line are the following statutes:

7 Henry 7, c. 7:

> All Scots, not made denizens, shall depart the realm within forty days after proclamation, upon pain of forfeiture of all their goods.

This act was repealed by 4 Jac. 1, c. 1.

3 Henry 8, c. 10:

> No alien shall buy any leather but in open market.

22 H. 8, c. 8, required denizen strangers to pay strangers' customs.

22 H. 8, c. 10, requiring "outlandish people calling themselves Egyptians" to depart the realm within sixteen days

after proclamation of the statute, on pain of imprisonment and forfeiture of goods, etc.

This act was enforced by 4 and 5 Eliz., c. 20, and 1 and 2 Ph. & M., c., 4. It gives summary power of seizure to sheriffs, justices of the peace, and escheators.

22 H. 8, c. 13, relieves alien bakers and brewers, etc., from penalties against alien artificers.

21 Jacs., 19, sec. 15. Aliens allowed the advantage of statutes against bankrupts.

12 Car. 2, c. 18, sec. 2. No alien shall be a merchant or factor in the plantations.

15 Car. 2, c. 15, sec. 3. Aliens allowed to set up the trade to dress hemp, flax, make twine, or nets for fishery, or cordage and tapestry hangings.

For a long time alien pagans, "Turks and infidels," were regarded as *perpetui inimici* until more humane ideas prevailed (1 Salk. 46).

32 H. 8, c. 16, is an act concerning the infinite number of strangers and aliens which increase to the great detriment, etc., of subjects of the realm. It limits the *status* of aliens.

Blackstone says this statute was repealed by 5 Eliz., c. 7, 1 Com., 372, but this has been questioned (Bacon Abr., 205, 7th Eng. ed.).

In recent times we have the case of the forcible emigration of the Acadians, who refused to take the oath of allegiance when Nova Scotia was conquered by the British. Although there were strong political reasons to

justify the forced emigration of the French, the act is generally condemned, largely, perhaps, through sentiment aroused by Longfellow's description of this peaceful people.

Within the past few years the French Republic has furnished another example of the exercise of this power by the expulsion of the Orleans and Bonaparte princes. Analogies might also be drawn from the forcible removal by the United States of Indians, who, for this purpose, as well as in the exercise of the treaty-making power, are regarded as aliens. In view of these instances, the statements of counsel's brief with reference to the exercise of this undoubted right of every independent government, are astounding.

It is said that in the time of Henry Second a law expelling strangers was passed at the Parliament of Wallingford in order to draw away Flemings and Picards who were brought into the Kingdom by the wars of King Stephen. (Daniel, 67; Bacon's Abr., 201; Aliens, C.)

To "expulse strangers" was considered at one time a royal prerogative. (3 Inst., 9.) (See note of instance against Flemings, Jews, and Italians in note to Dammares Trial. State Trials, Vol. 15, p. 528.) The power is now considered to be vested in Parliament. *(Ib.)* And so we have seen it has been mostly exercised by Parliament.

It is not denied that in this country there is a sovereign power somewhere, either in the Congress, the States, or the people, to prevent the intrusion of objectionable strangers into the country, and to remove them from it. We have seen that in England that power has been exer-

cised in early days as a royal prerogative, and generally through acts of Parliament passed as a gracious remedy extended by the King.

I have quoted at this extreme length from the accepted authorities upon international law, and given these examples of the exercise of the right, with the hope that even the rashness of counsel for the Six Companies will never again question the soundness of the proposition found at the beginning of this branch of the argument—a proposition supported, it is thought, by every leading publicist on international laws and also based upon the decisions of this court and the uniform contention of the executive branch of our government, as I shall seek to show under my next proposition. The reasons are so fully stated by these learned authors, and in the opinions of this court, that an attempt to give any new one would be useless.

It is to be noticed that these authorities make no such limitation as counsel seeks to engraft upon the rule, *i. e.*, that it is a right which the supreme power of a nation only has as incident to a condition of war, and then only to be exercised against citizens or subjects of the country with which the nation is in conflict; or in other words, it is only a war power.

It has been shown that history does not warrant this statement, and that it is not sustained, as is thought, by any respectable authority.

From whence is derived this so-called right which lies latent at most times, but springs into full being to be exercised against peaceable and law-abiding persons whose

only offense is that of birth, and who may, for aught we know, wholly sympathize with the government in whose territory they reside as against the land of their birth in the controversy which our argument supposes? The only answer I have ever found is admitted by the brief of counsel, and is found in the right of the sovereign or supreme power to do everything necessary to save the government.

I am not now discussing the power of the United States, but am considering the question under the law of nations. It is the old primal law of self-preservation then, to which we must look for the origin of the right. This duty or right is not confined to periods of warfare, but is a constant, continuing duty. It applies to predatory as well as recognized warfare; to invasions of plagues and pestilence as well as armed men; to corruptors of morals and the loyalty of the people as well as those who openly assail the life of the state. It is not then an occasional right, but a constant one, inherent in the nation, and without which it could not justly be denominated such; for I insist that an independent government without the right of self-preservation is an impossible conception.

If the right exists as against all dangers, it follows that the determination of the questions, when shall the right be exercised, and what are the dangers calling for its exercise, are questions belonging to the supreme political or lawmaking power, and are beyond the province of the judiciary. Questions arising from the abuse of the admitted right are cognizable in the forum of nations only.

In the growth of humane principles which has marked the intercourse of civilized nations with one another, moral rights and duties are often urged and respected, and hence the cases of hardship are rare. But these considerations of morality have not yet overturned, and while independent governments are maintained never can overturn, the right of each government to supremacy within its own territory.

It remains to inquire whether, as is insisted by counsel for the appellants, the United States of America are without these necessary and ordinary means of self-preservation. I insist that—

IV.

THE UNITED STATES ARE A NATION, POSSESSING LIKE POWERS WITH OTHER NATIONS IN THIS RESPECT.

This has been asserted in the most clear and explicit manner in *The Chinese Exclusion case* (130 U. S., 581) and *Nishimura Ekiu* v. *United States* (142 U. S., 651). In the opinions in these cases a large number of authorities are cited and many instances of the assertion of the principle by the political department of the Government are given.

The counsel for appellants, however, while denying in effect the doctrine of those decisions in their discussion of the power of the United States under the Constitution, seek to distinguish them on the ground that the persons there involved were not actually resident in the United States. This alleged distinction perhaps makes it proper

for me to follow it beyond the mere citation of those authorities.

I do not consider it necessary to follow counsel for the appellants in their aimless meanderings in search of the true location of the so-called sovereign power in this country. It has neither been asserted by me, nor so far as I know, by any advocate of the constitutionality of this act, that the United States may exercise "authority at discretion, and without responsibility." It seems sufficient to say that in the exercise of the enumerated powers of the Constitution, and those implied powers necessary to carry the express powers into effect, the Federal Government is sovereign, supreme, and to its will properly expressed through laws of Congress, within these limits, the people of the several States, the States themselves, and the people of other nations domiciled within the territory of the United States, must alike yield.

It is said that counsel for the United States can not point to any clause of the Constitution of the United States which warrants the exercise against a friendly resident alien of the power of expulsion. The right to expel a resident alien citizen of a government with which the United States are at war is conceded, and yet that concession must rest upon the general resultant of the powers conferred, rather than upon any specific language.

That the United States have all powers necessary and proper to carry the granted powers into effect is a principle of constitutional interpretation too well established to require argument. It is submitted that the exercise of such an implied power is not less necessary and proper

because the implication arises from several clauses of the Constitution than if it could be referred to one only.

Yet counsel assert that, while such was the conclusion in the *Legal Tender Cases* (12 Wall., 457), this court "were alarmed by the principle advanced by them" (the majority of the court in that case), and add, "their doctrine was merely a dictum and has never been followed by this court in any reported case."

In the *Chinese Exclusion Case* (130 U. S., 581) the court, after enumerating the several delegated powers of the Federal Government (pp. 604, 605) which make it a nation and give it supremacy in all relations to foreign countries, their citizens and subjects, states the conclusion as follows:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the Government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the Government the interests of the country require it, can not be granted away or restrained on behalf of any one. The powers of Government are delegated in trust to the United States and are incapable of transfer to any other parties. They can not be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the Government, revocable at any time at its pleasure. Whether a proper consideration by our Government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act are not questions for judicial deter-

> mination. If there be any just ground of complaint on the part of China it must be made to the political department of our Government, which is alone competent to act upon the subject. The rights and interests created by a treaty which have become so vested that its expiration or abrogation will not destroy or impair them are such as are connected with and lie in property capable of sale and transfer or other disposition, not such as are personal and untransferable in their character.

Any person reading this opinion will see that the conclusion is based upon the implications necessary to sustain the express and delegated powers considered as a whole, rather than upon any language found in any single clause or implications therefrom. This court has said that these implications are as much a part of the Constitution as if written therein. (*Ex parte Yarbrough*, 110 U. S., 651, 658.) In *Nishimura Ekiu* v. *United States* (142 U. S., 651, 659) this recognition of the sovereign power of the nation over the entrance of foreigners within its dominions is stated with the precision of a mathematical demonstration and supported by the implications derivable from the aggregate of the enumerated powers of the Constitution.

The Neagle Case (135 U. S., 1, 60–67) is another instance, fresh in the memory of all, of the application of implied powers under the Constitution derived not merely as a necessary implication from some one express power, but as a resultant from many. *Logan* v. *United States* (144 U. S., 263, 283) is another case of the same class, fully sustaining the earlier cases. To the challenge to point to any clause of the Constitution justifying the expulsion of alien resident Chinese laborers who have refused to comply with our laws upon the subject of registration, I answer

that I find the power in the grant to Congress of the right to pass laws to provide for the common defense and general welfare, to regulate commerce with foreign nations, to establish a uniform rule of naturalization, to declare war, to regulate commerce, etc., and to make all laws which shall be "necessary and proper for carrying into execution the foregoing powers" (not some one of them) "and all other powers vested by the Constitution in the Government of the United States or any department or officer thereof," which includes the treaty-making power vested in the Executive with the advice of the Senate.

By all these powers, and resulting therefrom, the complete control of the United States over our foreign relations is asserted. It is a matter of common knowledge that the necessity of a national government for that purpose contributed to the adoption of the Constitution, and was the most potential influence to that end. Foreign relations include the regulation and control of the subjects or citizens of foreign powers in the United States in all matters of international concern. It is a matter of international concern so long as the foreign subject has not expatriated himself and adopted another allegiance.

The right of expatriation exists as a question of American policy, and has probably, by recent treaties, become a principle of international law. It is thought that it has no application as between the subjects of the Chinese Empire and the Government of the United States. The right assumes that while citizenship is changed at the will of the

subject from one government or sovereign, it is at the same time transferred to some other.

International law recognizes no such person as the Wandering Jew, or The Man Without a Country, owing no allegiance or duty to any power. When he proceeds to terminate one citizenship, as incident to so doing he must commence or intitiate the acquisition of another by conduct or positive act. In other words, allegiance to sovereign power is, among civilized nations, a rule equally of international and divine law.

As Professor Tiedeman states it (Limitations of Police Power, § 58):

> In order that one may expatriate himself, he must, by naturalization, become the citizen of another State. International law does not recognize the right to become a cosmopolitan. * * * A State has as absolute a right to determine whom it shall make citizens by naturalization, as individuals have to determine of what State they will be citizens.

There can be no release of allegiance to the Chinese Government, in favor of American citizenship, because the positive law of the United States forbids the acquisition by Chinese subjects of such citizenship, and there can be no inherent right to acquire such citizenship against the positive laws of the country. The theory upon which individual cases are treated in international negotiations is that a long course of residence away from the country of birth, bearing none of the burdens of citizenship therein, coupled with continuous residence in some other sovereignty, raises a presumption of expatriation.

While, as has been said, it has heretofore been the

policy of the United States to encourage immigration, it has also equally been the policy to make citizens of these immigrants. I do not speak of this in that narrow sense which has characterized the managers of rival political parties and led to the abuse of our naturalization laws in all our large cities. I refer rather to that general public sentiment exemplified in our legislation, State and National, by which provision is made after certain fixed periods for the naturalization of these people and the use by them of the elective franchise.

The reason of these laws is found in the thought that participation in public affairs and self-government begets interest therein, has an educational influence, and hastens the time when the immigrant is in thought, as well as in fact, an American citizen.

But such has not been the policy with respect to immigrants from the Chinese Empire. They can not, by reason of their habits, become citizens in thought, and they are, therefore, forbidden by law to become such in fact.

They are here, then, subjects of and entitled to the protection of the Chinese Government. If their rights are invaded, that Government is justified in demanding indemnity of the United States; and as a member of the family of nations subject to international law we must yield to such demand.

These are fundamental principles often asserted and recognized in our own history. My only excuse for recalling these propositions is to give emphasis to the point of the absurdity of the claims of counsel for the Chinese, which in effect assert that a Chinese alien resident laborer

is in a more secure and favorable position, and has more adequate protection, than a resident citizen laborer. The former, as they contend, is protected by all the power of the Chinese Empire and of the United States, while the latter is protected by the power of this Government alone. In making this distinction I do not desire to be understood as asserting that the United States owe no duties to aliens, whether resident or mere temporary sojourners. I understand that such are entitled under the principles of international law to protection in their persons and property against invasion by individuals, or perhaps even by the authorities of the several States. My proposition is that they are not entitled to appeal to the Federal Constitution for protection against the Federal Government itself.

The negative of this proposition implies that the United States, in the exercise of the enumerated powers, are not sovereign as against foreign nations, their citizens or subjects.

The latter, under this construction, can come here, assume none of the duties or obligations of citizenship, and by a sort of prescription, the time necessary to establish which I have never seen defined, acquire vested rights against the exercises of the enumerated powers of Congress, and the police powers incident and necessary to every government.

It is true that there are limitations placed upon the exercise of these enumerated powers by the earlier amendments to the Constitution, but anyone acquainted with the history and purpose of those amendments knows that they were designed to limit Federal power as against the

citizen and the States. It was no part of that purpose to lessen the dignity or extent of the power of the United States as against foreign nations or their subjects. It is thought that this distinction must be recognized in all cases where alien residents invoke the guaranties of these amendments against Congressional enactment within the limits of the enumerated powers, and the necessary implications therefrom.

Aside from the consideration that it is contrary to the concept of a sovereign government that other sovereign nations may place or allow their subjects to acquire a residence that can not be dislodged or terminated, and plant colonies upon our shores foreign in allegiance as well as citizenship, which can not be suspended, the plainest dictates of expediency condemn such a contention.

In time of war these people might prove enemies already within our borders. To this it will be answered that in such event the right to terminate alien residence is admitted.

Upon what ground is this done? Undoubtedly to subserve the public welfare and safety, as a means of security and protection, not alone from acts of violence, but also from considerations of secrecy, public sentiment, breaches of the peace, etc. The Constitution of the United States has not limited the right to legislate in the interest of the public welfare to times of war. As cogent reasons may exist for excluding foreigners in times of peace, whether the right so to do is claimed or exercised on grounds of public welfare or health, in the exercise of the commercial power, the right to pass naturalization laws, to make

treaties, or under the implied right granted in the Constitution after the year 1808, or is derivable from the bestowal of all these powers and the necessary implication that thereby it was intended to create a nation, in the family of nations with the sovereign powers of such against all other nations, their subjects and citizens

And such in effect are the decisions of this court. Chae Chan Ping had resided in this country for many years—as long, I believe, as any of the appellants here. If these appellants have the same rights to protection as against Federal legislation as clothe a citizen about and accompany him wherever he goes, then the same rights clothed the appellant in that case. Indeed, it is a principle of international law that a citizen and subject carries with him in his person the sovereignty of his country, and an invasion of his liberties, in the absence of dereliction on his part, is a wrong to his sovereign or nation.

If Chae Chan Ping had by his residence here acquired the rights of a citizen, by which he could not be deprived of his liberty or property except by due process of the law, could not be driven from his native land except for crime, he went abroad clothed with these privileges and immunities, and no legislation could have taken them away. The entire case proceeds upon a theory utterly antagonistic to the contention that such alien resident has the same rights and is entitled to the same protection under the Constitution against Congressional action as the citizen. It would not be contended that the citizen could be deprived of the right to return, who had gone abroad under a license which had been annulled in his absence.

The case of *Wan Shing* vs. *United States* (140 U. S. 424) is of similar import.

These cases sustain the distinction that residence, domicile, and the right of a denizen can not be acquired by an alien in opposition to statutes of the country refusing citizenship. Such statutes overcome all presumptions of expatriation arising from long residence away from one's native land in a country where they are in force. It is true that commercial domicile and residence of a Chinese merchant were recognized by this court in *Lau Ow Bew* vs. *United States* (144 U. S. 47), but this was created by treaty—a law of the land—and, as the court held, had not been changed or modified in this particular by any subsequent act of Congress.

I conclude, therefore, that this court has in effect held that Chinese resident aliens are not entitled to the same degree of protection as against the power of the United States as are citizens of the United States. And, therefore, as we have seen under the law of nations, such persons may be summarily expelled, so the United States, which possess all the powers of any nation in this respect, can thus expel aliens for violation of any law rightfully enacted, just as this court held that as to aliens seeking admittance summary remedies could be adopted, and investigation need not be judicial in its character. (*Nishimura Ekiu* vs. *United States*, 142 U. S. 651.)

As we have seen, such has been the decision in the various inferior courts of the United States called upon to administer the act now under consideration. To hold otherwise, is not only to make it impossible for the law to

be enforced, as fraudulent entries could, and, judging from experience, would be made faster than trials could be had if all other business were excluded, but is also equivalent to a denial of the police power of the United States. This leads to the next proposition, which is—

THERE IS A POLICE POWER OF THE UNITED STATES WHICH EXTENDS TO AND EMBRACES ALL SUBJECTS CONFIDED TO THE GENERAL GOVERNMENT, AND AGAINST THE EXERCISE OF WHICH A CHINESE ALIEN RESIDENT LABORER IS NOT ENTITLED TO INVOKE THE GUARANTIES OF THE CONSTITUTION OF THE UNITED STATES, DESIGNED FOR THE PROTECTION OF ITS CITIZENS AND CITIZENS OF THE SEVERAL STATES.

I admit that a citizen of the United States can not be expelled from his country except as a punishment for crime, and that, too, after due trial and conviction.

It does not seem to me necessary to discuss at length the extent of and limitations upon the police power of the United States or of the several States. As a rule, the constitutional restrictions found in the earlier amendments have been likewise substantially embodied in the constitutions or bills of rights of the several States.

With reference to most of the concerns of life, so far as they are affected by the exercise of the police power, it is, under our form of government, by the police power of the States. But from the enumerated powers of the United States, and the implied powers necessary thereto, there comes a police power of the United States which, as to the subjects confided to the General Government, is as

supreme and paramount as the like power when exercised by any government on earth.

Mr. Hare in his great work (2 American Constitutional Law, 766) says:

> The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional provisions presuppose its existence, and none of them preclude its legitimate exercise.

He cites in support of this and his following propositions many decisions of this court.

The same enlarged meaning is given to the police power in the dissenting opinion in *Leisy* v. *Hardin* (135 U. S., 100, 129), where, quoting *Beer Company* v. *Massachusetts* (115 Mass., 153), it is declared "all rights are held subject to the police power of the State." The power to destroy buildings to prevent the spread of conflagrations, to destroy contract or charter rights by making a business a nuisance, clothing and property to prevent pestilence; the arrest and detention and acceptance of compulsory medical attendance for the same purpose, the police control of habitual criminals, the vagrancy acts, the confinement of the insane, are a few of the many instances of the exercise of the power—*salus populi est suprema lex.* In so far as powers have been conferred upon the Federal Government, there has accompanied the grant the necessary police power.

And while it was held in *Leisy* v. *Hardin, supra*, that the police power of the States, like the taxing power, could not be exercised as against the powers of the General Government, as that would imply the power to destroy, it

is thought that that proposition carries with it as a necessary implication the idea that the General Government as to these granted powers also possesses the police power proper to the due protection of the public; otherwise as to these subjects there would be no police power.

It is therefore insisted that upon these subjects the Federal police power is supreme and no constitutional provisions "preclude its legitimate exercise."

This, it is thought, is practically put at rest by the opinion of this court in *In re* Rapier (143 U. S., 110, 134), where it is said that—

> When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime and immorality. * * * We think * * * that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

So here, when the power is given to make or annul treaties; to establish uniform rules of naturalization; to regulate commerce; to prohibit after A. D. 1808 the migration or importation of persons, while the States were forbidden to enter into any treaty alliance, confederation, or any compact with a foreign power, it is plain that the subject of foreign relations is confided to the General Government, and it alone has power to fix the *status* of aliens. This carries with it necessarily the right to determine that they shall do certain acts, as to register, to

obtain or preserve a *status* already obtained, and, failing in that, shall be expelled from the country as lottery matter was excluded from the mails.

Both instances are examples of the exercise of police power, and as such are committed to the discretion and judgment of Congress.

Another example of similar import is found in "the act to prevent the importation of adulterated and spurious teas" (22 Stat., 451), which is an instance of the exercise of *police power* by Congress. It is thereby made unlawful for any person or persons, or corporation, to import or bring into the United States any merchandise for sale as tea, adulterated with spurious leaf, or with exhausted leaves, or which contains so great an admixture of chemicals or other deleterious substances as to make it unfit for use. The importation of all such merchandise is thereby prohibited. While it may be said that this act was passed pursuant to the power to regulate commerce, it is nevertheless a police regulation enacted for the general welfare of the people. Tea is an article of food in such general use that it is important to have it free from adulteration; hence this police regulation.

Will any lawyer contend that when such "merchandise" is imported into the United States the importer is unlawfully deprived of some right of property therein, when he is compelled to export it beyond the limits of the United States within the time fixed by the act? The act gives the importer or consignee no judicial remedy to determine whether the tea is adulterated or spurious; instead,

it provides a summary mode of enforcing the prohibition, to wit:

When a dispute arises on that question, it is to be referred for arbitration to a committee of three experts, "and their decision shall be final." If their decision be against the importer or consignee and the spurious tea be not exported as provided, the collector "shall cause the same to be destroyed. And the Secretary of the Treasury is empowered to enforce the provisions of this act by appropriate regulations."

We assume that none of our distinguished adversaries would for a moment contend that this act is in conflict with that part of the Constitution which says:

> No person shall be * * * deprived of life, liberty or property, without due process of law.

It certainly deprives the importer of the property, of the liberty to sell it, and of the property itself if he does not export it, and yet no lawyer will contend that, in such a case, the importer or consignee is *entitled* to have the matter judicially investigated or the facts tried by a jury.

The Constitution guards, with equal care, life, liberty, and property in so far as these inalienable rights are within its powers; and it is only when the general welfare requires it that any person within the protection of the Constitution can be deprived of any of these rights, and then only by due process of law.

Before anyone can claim due process of law he must base the claim on a right, and since no one can show a right to import adulterated tea and impose it upon the public, any more than to import the germs of yellow fever

or cholera for diffusion in the atmosphere, it follows that the modes of prevention and remedy prescribed by Congress in the matter of spurious and adulterated tea are within the Federal police power.

Similarly as the subject of immigration is within the power of Congress incident to "commerce" or "naturalization," then Congress has connected therewith the right to exercise police power for the general welfare, and so exclude and deport obnoxious subjects of China, as well as obnoxious products of that country, and by like summary proceedings.

Numerous examples, similar in character, might be cited.

Assuming the maxim that the safety of the people is the supreme law, then the police power in its relations to every subject of danger must, under our system, rest either in the States, or the United States, or the people. If it is assumed that Chinese alien labor is a public danger threatening the safety of the people, then the power to cope with it rests somewhere. If not in the United States, then it is in the States, or the people. If the latter, it occurs to me that the Chinese residents in this country have need to repeat the old prayer that they may be saved from their friends (or counsel); for if they can induce the court to hold that the power does not belong to the Federal Government, but yet rests in the people of the several States, no person who has witnessed the evils of Chinese immigration and competition with our laborers can doubt that the people of the States afflicted therewith will promptly rid themselves of the baneful presence by appropriate leg-

islation to that end. The last state of the Chinese in the country would then be worse than the first; for, while the act now under consideration seeks only to prevent the perpetration of frauds upon the Government through the incoming of other Chinese laborers claiming to be entitled to admission because of former residence, any action by the people of the States most directly affected would probably be drastic in its character, with the purpose not of protecting the Government and the duly accredited Chinese, but of expelling entirely from their domain an obnoxious race.

Of the right to exercise this power Professor Tiedeman says (Limitations of Police Power, p. 143):

> But it does not follow from this position that the State has not the right to compel the emigration of residents of the country who are not citizens. The obligation of the State to resident aliens is only temporary, consists chiefly in a guaranty of the protection of its laws as long as the residence continues, and does not deprive the State of the power to terminate the residence by their forcible removal. They can be expelled whenever their continued residence for any reason becomes obnoxious or harmful to the citizen or to the State.

It hardly seems proper in this court to allude to counsel's propositions that commerce only refers to merchandise and persons in motion, or that the United States have no police power. It is astounding that such mistakes, doubtless the work of others, escaped the keen intellects and comprehensive minds of the very distinguished counsel for the appellants.

I therefore conclude that,—

A

The law requiring registration of Chinese resident laborers is reasonable and necessary to identify those who are properly here, and thereby prevent the coming of others, and to secure the expulsion of those who are unlawfully in this country. Its purpose is *identification*, not *expulsion*, which it is insisted is a lawful purpose.

Registry is made necessary in most States as a prerequisite to the exercise of the elective franchise—the highest privilege of American citizenship. A refusal of this privilege to a citizen should, it is thought, be considered in this court as severe a punishment as a return to his native land, free of expense, of a Chinese subject. Many other examples are given of the exercise of this power of inquiry into the affairs of men on the part of the Government for its purposes, thus showing that the present cases are not instances of the exercise of any extraordinary or unusual power.

B.

It is next shown that by the last treaty between the United States and the Imperial Government of China express power is reserved by the United States to "regulate, limit, or suspend such coming or residence" of Chinese laborers "whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects, or threatens to affect, the interests of that country, or to

endanger the good order of the said country, or of any locality within the territory thereof."

It is insisted that the present law is but a regulation of such residence, and that had the Chinese laborers complied with its provisions it would not have called in any way for the exercise of the power here expressly stipulated for, to wit, the *suspension* of such residence.

It is also insisted that Congress is by the treaty, as well as by the Constitution, the sole and only judge of the extent and degree of the necessity that calls for the exercise of the rights here reserved. Attention is called to the fact that the necessity required by the treaty is not an overwhelming national necessity, but exists whenever good order in any locality is, in the opinion of Congress and the President, endangered, for it is assumed that the words used in the treaty, "Government of the United States," refer to the political department of the Government, and that the concurrence of this Court, as representing the judicial branch of the Government, is not required. It is also assumed that the "Government of the United States" has expressed its recognition of the necessity for such regulations, and suspension in the case of disobedience, by the enactment of the present law.

The power to regulate and suspend the residence of Chinese laborers here given, carries with it as a necessary incident the right to enforce and compel obedience to such laws or regulations as may be adopted to carry the power into execution, and to provide penalties for disobedience thereto. It is insisted that such only is the effect of the law under consideration. It is also insisted

that when this treaty was made between the high contracting powers, it was necessarily contemplated that it should be enforced by the treaty-making power of the United States, and no action of ejectment before the judicial branch of the Government was contemplated or is possible.

C.

A nation has the right, according to international law, to prescribe the terms upon which the citizens or subjects of other nations shall be admitted to its territory, to forbid such admission, or, having admitted such citizens or subjects, to regulate and limit their residence therein, and, whenever it chooses to do so, suspend such residence altogether and require that they shall depart its territory.

The leading and accepted authorities upon the subject are cited as sustaining this necessary incident of sovereign or independent government. It is urged that an independent government not possessing such power is an unthinkable conception—if I may use such a term—the contradiction of a supreme government unable to expel the subjects of another supreme government, and therefore the second power possessing through such subjects a limitation upon the first, thus destroying its independence.

In considering this as a question of international law, which has to do with the relation of nations towards one another, care should be taken not to confound the question with the consideration of the limitations upon the power of the nation or sovereignty as between it and its citizens. In the latter sense no civilized government is

sovereign or supreme. But in their relations with one another nations are so considered and are answerable only in the forum of nations. By consent a court may be organized to settle these disputes. This consent must be given in each instance, and, in the absence of such agreement and the failure of diplomacy, an appeal to the arbitrament of arms is the last resort.

Any other limitation upon the power of a nation as between it and other nations would destroy its autonomy and make it subservient to that government whose citizens had acquired the most numerous vested rights therein.

Numerous instances are cited of the exercise of this power by the civilized nations of the earth, extending from an early time down to the present, in which we behold France expelling the Bonapartist and Orleans princes, while Russia is now engaged in expelling the Jews, and laws looking to a limitation upon their rights and regulating their *status* have been in recent years a source of party strife in the German Empire.

It is also insisted that the right is constantly recognized as a matter of international law in the regulations concerning passports, and the notice to another government to recall its representative whenever such representative becomes *persona non grata*.

This power, incident to every sovereign nation, is political in its character, and for its exercise the nation can not be called to account in judicial tribunals. If injury is done reparation must be demanded by the nation whose citizen has suffered, and it lies with the political branch of the Government to determine whether it will accede to such demand or not.

It is insisted that this right to expel aliens is not a war power only, as counsel mistakenly suppose, but is a power of self-preservation and protection, to be exercised whenever the public exigency may require; that such exercise has been and must necessarily be as frequent in times of peace as of war; that its exercise may prevent war, famine, pestilence, local dissatisfaction, and breaches of the peace; internal strife; the introduction of social, political, and religious beliefs at variance with our policy and the spirit of our institutions, and that it has therefore never been restricted to a condition of war. In view of past experiences of civilized communities with hordes of barbarians, it does not seem possible that a rule never yet ingrafted upon this principle of self-preservation will have its origin in this court.

Again, it is now generally conceded that the most insidious and dangerous enemies to the State are not the armed foes who invade our territory, but those alien races who are incapable of assimilation, and come among us to debase our labor and poison the health and morals of the communities in which they locate.

Citizenship or denizenship against the will of the State is a new creation of inventive genius, and not anticipated by any publication prior to the brief of the counsel for the appellants.

D.

The United States are a nation possessing all the powers of other nations in this respect.

It is submitted that this question has been practically settled by the decisions of this Court in the *Chinese Exclusion Case* (130 U. S., 581) and *Nishimura Ekiu* vs. *U. S.* (142 U. S., 651), where the sovereignty of the General Government is strongly asserted.

The United States have all the powers conferred in express terms by the Constitution, and all powers necessarily implied from these that are necessary and proper to carry these into effect.

From these powers the complete control of the Federal Government over all foreign relations is deducible, while at the same time any connection therewith is denied to the States. The control over foreign relations, derivable from the several constitutional grants, necessarily requires the power to fix the *status* of alien subjects, temporarily or permanently residing in our territory. That is a subject with which treaties are largely concerned, and if, notwithstanding the enumerated powers of the Constitution, that subject could be regulated or controlled by the States, or the people of the States, in opposition to the United States, the treaty-making power could be nullified as applied to this subject; naturalization laws would be meaningless; commerce so far as it deals with passengers of foreign birth and allegiance might be subject to State regulation, and the right of expulsion, considered as a war power, extinguished. If the right to fix the *status* of aliens belongs to the United

States, there is also the usual right, which, we have seen under the principles of international law, belongs to every independent government, to deny to such aliens any *status*, or to limit, or change, or suspend at any time such as has been accorded them.

In short, the United States have the same means of preservation as have other nations, and may therefore expel the Chinese laborers at any time when their presence here is deemed harmful to our people or to any locality.

This doctrine, it is contended, in no way denies the doctrine of expatriation to which the United States have long stood committed, and which, by reason of recent treaties, may now perhaps be considered a principle of international law. That doctrine simply asserts the right of the citizen to renounce his allegiance. But as a matter of international law, when such renunciation is made, whether by positive declaration or conduct, another citizenship or allegiance must be initiated or entered upon.

The law of nations does not recognize the *status* of the cosmopolitan. The original allegiance continues until the new is secured. The Chinese have been prevented by positive law from becoming citizens or subjects. This law overcomes all the presumptions arising from long residence as to renunciation of allegiance, domicile, denizenship, etc. With such a law Chinese laborers must remain subjects of the Emperor of China, and as such subject to expulsion at any time from our territory under such conditions as Congress may see fit to prescribe, if the United States has the same power as other nations in its relations with foreign powers, their citizens and subjects.

E.

The Chinese may also be expelled under the police power of the United States, and against the exercise of this power cannot invoke the protection of those constitutional provisions designed to protect the citizen in the enjoyment of his life, liberty, and property.

As to those subjects confided to the Federal Government, it is contended that the police power accompanied their grant, and it is to be exercised by the United States upon the same principles and to the same extent as the like power is exercised by the several States as to subjects within their jurisdictions. The right to fix the *status* of aliens having been confided to the Federal Government by the Constitution, the right to deny or destroy such *status* is derivable also from the police power as well as from the general principles of international law.

These principles answer all the arguments for appellants based upon constitutional guaranties, for, in the exercise of the police power, property and personal rights, as usually denominated, are compelled to give way. Numerous examples have been cited, and the conclusion seems justified, upon reason and authority, that all constitutional provisions presuppose the existence of the police power, and none of them preclude its legitimate exercise. A citizen becomes such at birth, and inherits rights under the Constitution as his birthright without the will of the State, while the alien acquires none without the consent of the State, and only such and for such time—short of citizenship—as the State continues such consent.

Therefore, as between such alien and the State, there is no protection under the Constitution. He must appeal to the sovereign to whom his allegiance is due.

It is an old axiom that time does not run against the king, yet that is practically what counsel are demanding in behalf of appellants, for they claim for them all the constitutional protection awarded citizens; at the same time we see that the United States reserved the right to suspend their residence in this country at any time when deemed necessary, and has at all times by positive enactment forbidden the acquisition of citizenship. These claims of counsel have, therefore, no other basis than a residence for an indefinite time within our borders. In view of these facts, the claim of the protection of two nations, while subject to the burdens of neither, is a bold one.

I have not discussed the questions growing out of the character of the evidence required by the act, for, if the foregoing propositions are sound, as it is confidently believed they are, it follows that the United States have an absolute right, as a judicial question, by treaty, by the rules of international law, under the Constitution and in the exercise of their police power, to expel these alien residents without process, hearing, or evidence of any kind. Hence the question of the character and weight of the evidence, if the United States choose to accord them any rights in that respect, can not be important.

In conclusion it is insisted on behalf of the United States that the law is reasonable in its provisions, might

easily have been complied with, was enacted in accordance with well settled principles of international and constitutional law, and therefore the judgment of the courts below in all three of the cases must be affirmed.

CHARLES H. ALDRICH,
Solicitor-General.